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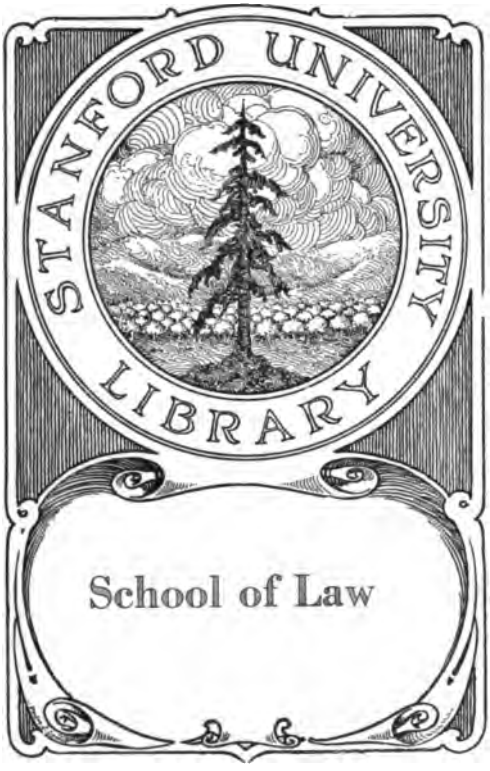

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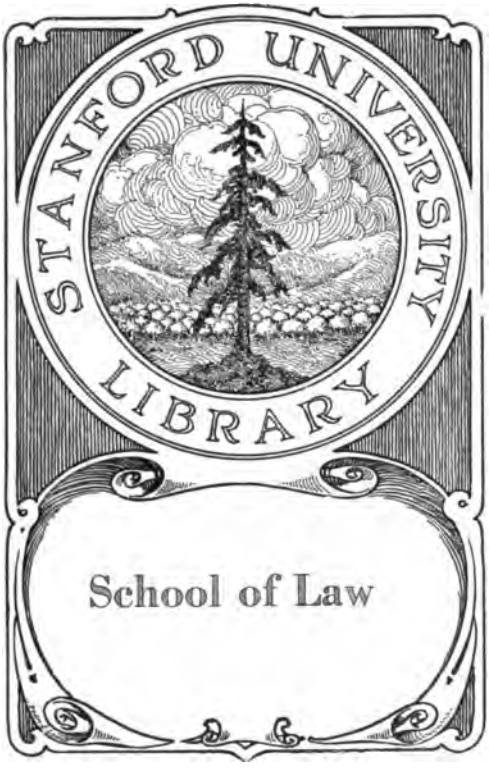

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TO OUR READERS.

With greetings for the New Year we have sent to our subscribers a photograph of the judges of the Supreme Court of Canada; and with this number we send our sheet almanac for 1898.

We trust our readers will also appreciate the prompt production of the Index for the volume which has just been completed. Neither time, money nor trouble have been spared in the preparation of this exhaustive analysis of the contents of the volume. It contains (including table of cases) 47 pages of closely printed matter, and is in effect a digest in condensed form of all principal matters of interest to the legal profession in the English speaking Provinces, which have transpired both there and in England during the past year.

We thank many of our readers for their kindly expression of appreciation for the increased usefulness of the JOURNAL, and their flattering comments on the enterprise displayed. The most substantial evidence of this is a very large increase in circulation. We shall spare no effort to retain the good opinion of our rapidly increasing circle of friends and patrons.

We have received from Mr. J. S. Ewart, Q.C., a letter referring to our criticism, under the heading "Mispresentation as Negligence," of an article written by him and published in a contemporary journal. Want of space compels us to hold over his letter and our answer thereto until our next issue.

On the 18th November last the resignation of the Hon. John Foster McCreight, who for the past nineteen years has been Judge of the Supreme Court of British Columbia, was announced. Mr. McCreight was the last of that race of well trained English barristers who came to that Province on the discovery of gold in the early sixties. He immediately took and maintained his position as a leading authority on all questions of law. For a short period he was Premier of the Province under the first responsible Government, after Confederation. Through and through a lawyer, learned, conscientious, fearless, indefatigable and possessed of a marvellous memory of cases in all branches of the law, he carries with him on his retirement the esteem and respect of all with whom he has come in contact.

The appointment of a successor to Mr. Justice McCreight was deemed in legal circles in British Columbia a matter of pressing importance. Owing to the illness of two judges an excessive strain was thrown upon the other occupants of the Bench, and the Benchers of the Law Society of that Province considered it of sufficient moment to despatch an urgent request to the authorities at Ottawa that the appointment of a Judge to fill the vacancy might not be delayed. Mr. P. Æ. Irving, Q.C., who was mentioned as his possible successor, and who, it was said, would be acceptable to the profession, has received the appointment. It is believed to be a good one.

The profession will watch with interest judicial appointments by the government which has recently assumed the reins of power. We are glad to voice the general opinion that the three which appear in the *Canada Gazette* of the 1st inst., are exceedingly good. Of Mr. Justice Irving we speak in another place. Mr. John A. Barron, Q.C., of Lindsay, will, we venture to predict, prove a valuable addition to the County Court bench. He is a sound lawyer, of good judgment, and irreproachable character. He has had a large

practice in criminal as well as in general law, and his parliamentary experience will be valuable in many ways. He takes the place vacated by Judge Woods in the county of Perth. We note that this appointment is one of the very few where a judgeship is filled by one residing in another county. We have already expressed the opinion that this is the proper course, and trust it may hereafter prove the rule and not the exception.

The appointment of Mr. D. B. MacTavish, Q.C., as Senior Judge of the County of Carleton meets with general acceptance where he is best known. Not only a good lawyer, but a member of a firm in large practice, he will bring to the discharge of his duties a ripe experience. For some years city solicitor, he has a thorough knowledge of municipal law, of great value in his new position. Mr. MacTavish takes the position occupied by Judge Ross. This appointment, or some appointment, should have been made long ago. Public interest demanded it. The Bar should not be made to suffer from political exigency, and especially when an appointment was so imperatively and so long required as in the present instance.

The judgment of the judicial Committee of the Privy Council in the appeal by the Attorney-General for Canada from the judgment of the Court of Appeal for Ontario in the Queen's Counsel Case was delivered on the 8th of December. The hearing took place on the 30th July last when counsel for Ontario were not called on. The Judicial Committee decides in effect that the Ontario Acts of 1873, (see R.S.O. 1877, c. 139), conferring on the Lieutenant-Governor power to appoint Queen's Counsel and to regulate precedence, etc., are within the legislative competence of the Provincial Legislature under the B. N. A. Act, enumerations 1, 4 and 14 of s. 92. Their Lordships, however, refrain from dealing expressly with the question whether such power existed as a prerogative right independently of and prior to the passing

of the Acts, merely affirming the decision appealed from in general terms. The judgment in the Fisheries Appeals is not expected to be delivered before the February Sittings of the Judicial Committee.

The death of Sir Charles Pollock of the English Bench has been announced. He was the fourth son of the late Chief Baron Pollock, and came of a family which supplied the Bar with a greater number of distinguished men than any other. It is noted in our exchanges with special interest, as he was "the last of the Barons." Our namesake in England regrets that the ancient title should no longer be borne by any member of the Bench, as it has not been without a judge bearing the title of Baron for some six hundred years. His death means also a reduction to five in the number of the fast disappearing order of Sergeants. The only surviving members of the ancient order of the Coif are Lord Penzance, Viscount Esher, Lord Field, Sir Nathaniel Lindley and Mr. Spinks. We note also that a peculiarity of the elevation of Sir Walter Phillimore to the Bench, in succession to Baron Pollock, is that the son of a judge is followed by the son of a judge. Also that the Bench now has three occupants whose fathers adorned it before them, viz.: Lord Justice Williams, Mr. Justice Channell and Mr. Justice Phillimore.

THE BENCH AND ITS CRITICS.

We referred shortly in our last issue to some articles which recently appeared in one of our leading daily journals commenting freely upon the administration of justice by the judiciary of the Province. The subject is important and should not be passed over, although it is a difficult and a delicate one to deal with.

In one of these articles a learned judge was criticized adversely for having with undue haste, as it is alleged, closed the Criminal Assize at Toronto; in another, sweeping charges are made under the caption of "Autocracy on the Bench." Other articles have appeared since and several letters have

been written to the lay press on the same line. As to the first article the criticism at first blush seemed to have some merit, but an examination into the facts would seem to indicate that after all a wise discretion was probably exercised. As to the other article, lovers of their country will, we think, agree with us that the greatest care should be exercised by the press in matters of this sort. In the first place it should not be forgotten that judges cannot take up their pens to reply to attacks made upon them, nor is it possible for any one on their behalf, except in the most general way, to answer general charges.

Another important consideration and one which lies at the root of all good government, is that general charges such as those alluded to tend to weaken the administration of justice, and it is not desirable, especially so at this period of the world's history, to do or say anything which would tend in the slightest degree to disintegrate the fabric of society in this or in any other way by bringing into disrepute those who are appointed to administer justice and conserve law and order. We are menaced on all sides by the spirit of anarchy, which we see developing itself in varied forms and with increasing vitality. Self-preservation compels us to be careful not to give an opening to this enemy.

There is a clear distinction to be drawn between general charges and specific charges. It is within the province as well as it is the duty of public journals, and desirable in the public interest, that all defects in the administration of the law, and all slackness or impropriety on the part of its officers, should receive attention and be commented upon with a view to their cure or prevention. But this is manifestly a different thing from making general charges against the judiciary that its members are arbitrary, unreasonable, partial or careless, either in general or in reference to some particular class of the community.

Criticisms in reference to specific charges, we may remark, are being constantly made in England, but all respectable journals set their faces against, and decline to make attacks of a general character.

We have every reason to be and are exceedingly proud of our judiciary. Being mortal, they are imperfect. Some of them have personal characteristics which are occasionally irritating and possibly offensive, and which sometimes seriously detract from their usefulness, but on the whole we recognize their general worth and their conscientious regard for the duties connected with the responsible position in which the crown has placed them. Anything which lessens the dignity of the judicial position, or in the slightest degree conveys to the public any suspicion that justice is being carelessly and improperly administered, is most damaging to the welfare of the State. Each citizen is deeply interested in the maintenance of law and order, and we are only doing ourselves harm when we weaken the hands of those who dispense justice. The judges are the representatives of the Sovereign, and the Sovereign, under our present system of government, is practically the will of the people—ourselves.

There is no divinity to hedge a judge; and he cannot claim to be beyond reasonable criticism. If a judge ought to be retired by reason of his unfitness or incompetence whether on physical, mental or moral grounds, the Government is remiss in not dealing with such a case, and it is manifest that no such judge should be allowed to remain on the bench. If there is any ground of unfitness or incompetence, or any act which would indicate any departure from that high plane of moral rectitude which has happily always been and is now the pride of the Ontario bench, the press is certainly within its limit in drawing attention to particular instances in a calm and dispassionate manner. This, however, is very different from a general onslaught such as already spoken of, which too often has its foundation in the disappointment or malice of an unsuccessful solicitor or counsel.

It is the duty of the Minister of Justice to see that the machinery of the courts is kept in good running order; and the judges, as important parts of such machinery, have the right to be protected as well as the public, and it is for the public welfare that they should be. It would, therefore, seem to be the duty, when a proper occasion presents itself,

for the Minister, who is presumably the proper person to act in such cases, to make an investigation, so that the State may suffer no detriment, and that justice may be done in the premises. The new Minister of Justice, Hon. Mr. Mills, is an eminently fair and just man, and, by reason of his want of local connection with Toronto and the Local Legislature, is in a position to deal with the whole subject in a manner entirely independent of personal or judicial association, and we believe the bar will be satisfied with his conclusions, after he has made a careful enquiry into the cause or causes of the murmurs and complaints which are undoubtedly in the air.

ACTIONS ON BONDS.

Notwithstanding the Judicature Acts, and the Law Courts Act, and that the Rules of Practice have been so often revised and amended and consolidated, the procedure on bonds as laid down by the 8 & 9 Wm. III, c. 11, has not been materially affected (*a*).

Rule 580 provides "Notwithstanding anything in the Rules contained, the provisions of the Act of the Parliament of Great Britain passed in the session held in the eighth and ninth year of the reign of King William the Third, entitled 'An Act for the Better Preventing Frivolous and Vexatious Suits,' as to the assignment and suggestion of breaches, and as to judgment, shall continue in force in Ontario."

The Act referred to in this Rule is the 8 & 9 Wm. III, c. 11 (*b*).

(*a*) See *Tuther* v. *Caralampi*, 21 Q.B.D. 414.

(*b*) Section 8 provides that "In all actions which shall be commenced or prosecuted in any of his Majesty's Courts of record, upon any bond or bonds or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury upon trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions. And if judgment shall be given for the plaintiff on a demurrer, or by confession or nihil dicit, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices, or justice of assize or Nisi Prius, of that county, to inquire of the truth of every one of these breaches, and to assess the damages that the plaintiff shall have sustained

This statute, so far as it required the writ to be executed before the justice of assize or nisi prius, was, in cases where breaches were suggested on the roll after judgment, and perhaps in all cases where no issue was joined, altered by 3 & 4 Wm. IV., c. 42, s. 16, which, to prevent delay, provided that in such cases the damages could be assessed by the sheriff and a jury instead of a judge at assize or nisi prius. Sec. 16 was repealed in Ontario (*a*) and now the damages may be assessed as provided by Rules 578, 579, 589.

It must be borne in mind that common money bonds do not come under 8 & 9 Wm. III, but are subject to the statute 4 & 5 Anne, c. 16, s. 12.

Common money bonds are bonds with the condition to pay a sum of money at a certain day, upon payment of which the bond is to be void, otherwise it is to be forfeited (*b*), but if the condition aims at securing any other matter—as the performance of the covenants in a deed, the faithful discharge of an office or the rendering of accounts, upon satisfoction of which the bond is declared to be void—such bonds are called bonds with special conditions (*c*), and the procedure on such bonds is governed by the 8 & 9 Wm. III, c. 11.

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thereby; in which writ it shall be commanded to the said justices or justice of assize or Nisi Prius, that he or they shall make return thereof to the Court from whence the same shall issue. at the time in such writ mentioned. And in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay into the Court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding in each case such judgment shall remain, continue, and be as a further security, to answer to the plaintiff or plaintiffs and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a scire facias upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to shew cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, or enquiry thereof, upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so toties quoties, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

(*a*) See C. S. U. C., c. 22, s. 149. R.S.O. (1877) c. 50, s. 152.

(*b*) Leake on Contracts, 3rd ed., 122.

(*c*) Leake, 122.

At common law the whole penalty of the bond was recoverable upon breach of any of the conditions in the bond. In fact only one breach could be assigned, upon proof of which the plaintiff was entitled to judgment for the whole penalty (*a*). Courts of Equity, however, gave relief to the obligor upon his paying the amount really due or upon payment of the damages arising from the breach of the condition. The above statutes aimed at giving courts of law power of granting similar relief in certain cases.

Under the 8 & 9 Wm. III, c. 11, judgment is entered for the whole penalty and costs, but the plaintiff is entitled to execution only for the damages assessed and costs (*b*). The defendant is not entitled to have satisfaction entered up upon showing payment of damages and cost, because the plaintiff is entitled to the judgment as security for future breaches (*c*).

The statute does not extend to a bond for the payment of a sum certain at a day certain (*d*); nor a common money bond (*e*) or a bond for the payment of money at a given rate of interest in the meantime by instalments, with a clause that the whole sum shall be due on default of payment of interest (*f*); or a bond to replace stock (*g*); or bonds where the damages assessed are calculated to satisfy the entire condition (*h*).

This statute did not extend to bail bonds (*i*); or a replevin bond (*j*); because courts of law could afford relief in such cases to the defendant without his being compelled to file a bill in equity, and such cases therefore did not fall within the rule which called for the Act.

(*a*) *Steward* v. *Greaves*, 10 M. & W. 715, per Parke B; *Hardy* v. *Bern*, 5 T. R. 636.

(*b*) *Carlisle* v. *Hostel*, 7 L.J. 99; *Wilde* v. *Clarkson*, 6 T.R. 303; *Welch* v. *Ireland*, 6 East. 613. 1 Wm. Saunders, 1871 ed. pp. 75 et seq.

(*c*) *Hill* v. *Hill, et al.* 1 P.R. 268; *Carlisle* v. *Hostel*, 7 L.J. 99; *Randall* v. *Burton*, 23 U.C.R. 268

(*d*) *Murray* v. *Earl of Stair*, 2 B. & C. 82, 89, 3 D. & R. 278; *Cardoso* v. *Hardy*, 2 Moore 220.

(*e*) 4 & 5 Anne, c. 3. *Gerrard* v. *Clowes*, (1892), 2 Q.B. 11.

(*f*) *James* v. *Thomas*, 5 B. & Ad. 40. *Van Sandau* v.—— 1 B. & Ald. 214.

(*g*) See *Savile* v. *Jackson*, 13 Price, 715.

(*h*) *Savile* v. *Jackson*, 13 Price, 715; *Smith* v. *Bond*. 10 Bing. 125.

(*i*) *Moody* v. *Pheasant*, 2 B. & P. 446.

(*j*) *Belcher* v. *Burn*, 24 U.C.R., 259; *Middleton* v. *Bryan*, 3 M. & Sel. 155.

In an action on a bail bond to the sheriff, the Court may now give such relief as may be just and reasonable (*a*). A replevin bond is now subject to 8 & 9 Wm. III, c. 11 (*b*).

Bonds for the payment of money by instalments (*c*); or upon a written instrument for the recovery of a penalty though not under seal (*d*); or the payment of an annuity (*e*); or the performance of an award (*f*); or the performance of any other specific act (*g*), are within the Act. The statute also applies to actions for penalties on covenants and agreements in writing, for payment of a penalty on non-performance (*h*). Even though a bond on the face of it be a common money bond, yet if there be a concurrent instrument showing that it is in substance a bond intended to secure the performance of covenants within the meaning of the statute, it falls within the statute, although the bond does not refer to the instrument which explains it (*i*).

It will be noticed that Rule 580 does not provide that all the provisions of 8 & 9 Wm. III., c. 11, shall continue in force, but only such parts of this Act as relate to the assignment and suggestion of breaches and as to judgment. Before the Judicature Act a plaintiff had two courses open to him in suing on a bond within 8 & 9 Wm. III. c. 11. He could frame his declaration claiming the penalty without mentioning the condition in the bond, and without assigning a breach of it, or he could set out the condition and allege breaches. If the breaches were not assigned the defendant could set out the condition in his plea, and plead that he had performed it, or he could plead any answer which would excuse performance of the condition. If the condition and breaches were set out in the declaration, the defendant could plead

(*a*) Rule 1035.

(*b*) Rule 1073

(*c*) *D'Aranda* v. *Houston*, 6 C. & P. 511; *Preston* v. *Dania*, L. R. 8, Ex. 19.

(*d*) See *Drage* v. *Brand*, 2 Wils, 377.

(*e*) *Walcot* v. *Goulding*, 8 T. R. 126; *Tuther* v. *Caralampi*, 21 Q.B.D. 414.

(*f*) *Welch* v. *Ireland*, 6 East. 613; *Hanbury* v. *Guest*, 14 East, 401.

(*g*) Leake, 122.

(*h*) 2 Wm. Saunders (1871 ed.), 541; *Betts* v. *Burch*, 4 H. & N. 506, 510; *Ex p. Capper*, 4 Ch. D. 724.

(*i*) *Hurst* v. *Jennings*, 5 B. & C. 650; *Quin* v. *King*, 1 M. & W. 42.

denying the bond or breaches or both or confessing the bond or breaches or both, and pleading excuse for non-performance (*a*).

If the plaintiff did not set out the condition and breach in his declaration, and the defendant pleaded performance generally, then under the statute it was necessary for the plaintiff in his reply to assign the breaches upon which he intended to rely (*b*). If the defendant denied making the bond or pleaded any other plea in excuse, then after issue was joined the plaintiff was obliged, under the statute, to suggest on the record all the breaches which entitled him to have the bond declared forfeited (*c*). If the defendant allowed judgment to go against him by default or on demurrer, and the breaches had not been assigned in the declaration or reply, the plaintiff was obliged to suggest the breaches on the record in the same way as when the plaintiff joined issue on the defendants denial (*d*).

The statute made it compulsory to assign or suggest breaches and damages could only be assessed for breaches assigned or suggested (*e*). A verdict taken without assigning or suggesting breaches, was irregular and could be set aside (*f*).

In all cases in actions on bonds within 8 & 9 Wm. III, c. 11, whether the defendant appeared or not, the damages should be assessed at the sittings or assizes, and it was irregular to enter up final judgment without assessing damages for the breaches assigned or suggested (*g*). The defendant could not assign or suggest breaches which occurred after the action was commenced, but he was obliged to proceed by scire facias upon the judgment (*h*).

Under the practice as laid down in the Rules, a plaintiff

(*a*) 2 Wm. Saunders (1871 ed.), 544.
(*b*) 1 Wm. Saunders, 133; 2 Ib. 544.
(*c*) *Homfray* v. *Rigby*, 5 M. & S. 60; *Arch. of Canterbury* v. *Robertson*, 1 C. & M. 690; *Webb* v. *James*, 8 M. & W. 645.
(*d*) *Lawes* v. *Shaw*, 5 Q.B. 322.
(*e*) *Walcott* v. *Goulding*, 8 T.R. 126; *Welch* v. *Ireland*, 6 East, 613.
(*f*) *McMahon* v. *Ingersoll*, 6 O. S. 301.
(*g*) *Douglas* v. *Powell*, 2 O. S. 87.
(*h*) *Willoughby* v. *Swinton*. 6 East, 550. But see *Leach* v. *Stevenson*, 3 O. S. 310.

in an action on a bond within 8 & 9 Wm. III, c. 11, may still claim the penalty in his statement of claim without assigning breaches, but the course usually adopted is to set out the condition and allege the breach or breaches upon which the plaintiff intends to rely, and ask for a declaration that the bond has become forfeited and judgment for the whole penalty of the bond so that the judgment may stand as security for future breaches.

No reference is made in the Judicature Act or the Rules to the writ of scire facias, and the writ is probably not abolished. Lord Justice Lindley says the writ is not abolished (*a*), and it has been adopted in several cases since the Judicature Act came into force (*b*). Instead of proceeding by scire facias to assess damages for further breaches, the plaintiff could probably proceed by petition under Rule 642 (1), and instead of directing that the damages for further breaches assigned be assessed by a judge at the sittings, the Court could probably refer it to the Master to assess the damages under Rule 579.

The liability of the obligor on the bond is limited to the amount of the penalty (*c*), but where the condition shows a contract or covenant to do or abstain from doing a particular act, such contract or covenant may be enforceable by injunction (*d*). The penalty of a bond within 8 & 9 Wm. III., c. 11, cannot, of course, be claimed by special endorsement (*e*), but in the case of a common money bond within 4 & 5 Anne, c. 3, the writ may be specially endorsed with a claim for the amount of the bond (*f*).

Interest, when expressly made payable by the bond, might formerly have been claimed by special endorsement (*g*), but now interest may be specially endorsed whether it is expressly made payable or not (*h*).

M. H. LUDWIG.

(*a*) Lindley's Law of Companies, 5th ed., 281.
(*b*) *Shaver* v. *Cotton*, 16 P.R. 278; *Brice* v. *Munro*, 12 A. R. 453; *Portal* v. *Emmens*, 1 C. P. D. 201, 664; *Kipling* v. *Todd*, 3 C. P. D. 350
(*c*) *Wilde* v. *Clarkson*, 6 T. R. 303; *Branscombe* v. *Scarbrough*, 6 Q.B. 13; *Hatton* v. *Harris* (1892) A.C. 547; *McMahon* v. *Ingersoll*, 6 O. S. 301; *Randall et al.* v. *Burton et al.* 4 P. R. 9.
(*d*) *London, etc., Bank* v. *Pritt*, 36 W. R. 135; *National, etc., Bank* v. *Marshall*, 40 Ch. D 112.
(*e*) See *Tuther* v. *Caralampi*, 21 Q.B.D. 414.
(*f*) *Gerrard* v. *Clowes* (1892) 2 Q. B. 11.
(*g*) *Steeds* v. *Steeds*, 22 Q. B. D. 537.
(*h*) Rule 138.

OBITER DICTA.

It was the wish of the King . . .
Grandly to hold a magnificent Court, and with that intention
One with another he summoned, the small as well as the great ones.
GOETHE: *Reineke Fuchs.*

We think the latter part of the above quotation applies with some significance to the summoning of Mr. Charles J. Darling, Q.C., M.P., to the English Bench, which has brought down upon Lord Chancellor Halsbury's head a storm of abuse quite as violent as that which assailed Lord Campbell when he appointed unpretentious Colin Blackburn to the Queen's Bench in 1859. But we fear that the present Chancellor cannot emulate King Lear and bid the wind blow until it cracks its cheeks with the same firm belief in time justifying his choice that animated Lord Campbell. Perhaps Blackburn was no better known as a practitioner at the Bar than the newly appointed judge, but in the case of the former there was the reassuring fact that he was above all things a bookman, and that he had, moreover, undergone a splendid training in case-law as a reporter of the decisions of the Courts. Mr. Justice Darling has, it is true, dabbled in literature with a legal flavor about it; but that legal flavor is extremely tenuous, and the literature itself not to be called robust. We feel that it would be far safer to predicate the possession of an adequate quantum of the judicial quality on the part of one of the compilers of Ellis and Blackburn's Reports than on the part of the author of "Scintillæ Juris." Speaking of the latter upon its merits, we hold to the view that the humorous side of the reason of the law demands a deft and subtle hand in its presentment; and hopelessly fatuous is the effort of him who attempts to exploit it without the needful talent therefor. "Scintillæ Juris," we regret to say, has to be classed amongst the most dismal failures in the legal catalogue. We cannot recall that we ever met with anything more absolutely banal in all the literature of the profession than the author's chapters on "Advocacy" and "Maxims." The Machiavelism of the former chapter, however, would be mischievous if it were not silly. *Ruit mole sua.*

Before quitting the subject, we should like to say that the opening paragraph of his chapter on "Judges" has now a peculiar significance. He says: "It is a natural result of the laws not being understood by those who make them, that persons of *legislative* (the italics are ours) capacity should be employed in their interpretation and improvement." Mr. Justice Darling was himself an M.P. when he made this naive confession of the nescience of British law-makers; could it be expected, then, that he would come to the Bench clothed cap-a-pie in the mantle of the judicial quality, even as he understands its texture?

* * *

The publication of the fourth edition of Mr. Hunter's excellent work on Roman Law reminds us that the charge of "looking to Rome" can nowadays be applied with quite as much force to English lawyers as to some English churchmen. With the first appearance of Maine's "Ancient Law" the insular prejudice of the average English lawyer against the study of the great Roman system began to abate. He came to recognize that it was not the product of mediæval monks; that Canon law and Roman law were not convertible terms; and, most astounding fact of all, that a very considerable portion of the foundation of the Common law was hewn in the Roman quarries. The writings of Bentham and Austin had prior to this, it is true, stimulated in England the study of the historical and philosophical phases of jurisprudence; but they were hard reading, and sought their constituency in minds of an academic caste. Sir Henry Maine, on the other hand, places the treasures of his learning within the reach of all sorts and conditions of men in the profession. The scholar here finds an explication of the recondite sources of modern law which disarms his criticism, and compels his assent; while the busy man of affairs, who can only employ his spare moments in expanding his knowledge, is led over a broad and pleasant path to the desired goal, without having to flounder wearily through mazes of crabbed text and morasses of laboured foot notes, which unsettle rather than

inform the average mind. So, we repeat, it is to Sir Henry Maine that the honour belongs of broadening the views of the profession in England as to the history and philosophy of the law. And what Maine so admirably began has been zealously forwarded by Markby, Holland, Pollock and Hunter. It is not too much to say of the latter that what Pothier and Savigny did for the study of the Roman law in France and Germany, respectively, he has accomplished for it in England. He has opened for his fellow-countrymen the hitherto sealed door of the stately treasure house of the Corpus Juris Civilis. Strange as it may seem, it is quite possible that ere long Blackstone may be entirely displaced as the fetish of English law students, and the devoirs of their bibliolatry accorded to Hunter's Roman Law.

* * *

The popular opinion that Astraea and the Muses are not the best of friends is quite a mistake. History tells us that the laws of Pittacus were in verse, and so were those of Charondas (see Gibbon's Decl. and Fall R.E. ch. 40). It is also on record that in ancient Erin the poets were regularly entrusted with the exposition of the laws,—and not altogether with the happiest results to the judicial bards, so it is said. Unfortunately, on one occasion (see Patterson's "Liberty of the Subject," ch. 12, p. 137) a bard erred so prodigiously in his metrical rendering of a certain ratio decidendi that the legislative authority determined to then and there rob the sweet singers of their forensic functions. This was, no doubt, the beginning of the era of prosy judgments. It must be remarked, however, that the change did not wholly produce the desired improvement, for Irish judges have been known to err in prose. Blackstone, it is true, felt himself impelled to abandon his muse after he entered upon the serious business of the law, and perhaps it is just as well for his reputation that he did; but we know that one of the most illustrious lawyers of our own times—Sir Frederick Pollock—is wont to frequently put aside his learned lucubrations, so that he may refresh the real inner man with the waters of Aganippe. Then there is the case of Sir John Davies, the

first reporter of Irish decisions, of whom Wallace ("The Reporters," p. 229) says "he was one of those rarely found men to whom Heaven gives genius." Death robbed him of the Chief Justiceship of Ireland under James I., but could not rob him of the splendid fame accruing to him from his poem "On the Immortality of the Soul," written after he had gone to the Bar, and had become a busy member of Parliament. By the way, it would do none of us any harm to read that noble poem some of the long winter evenings. It is capable of restoring our faith in more than poetry.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

VENDOR AND PURCHASER—IDENTITY OF PARCELS - PAROL EVIDENCE—STATUTE OF FRAUDS (29 CAR. 2, C. 3) S. 4.

In *Plant* v. *Bourne*, (1897) 2 Ch. 281 the question how far parol evidence is admissible to show the parcels referred to in a contract for the sale of lands, is discussed. By the contract in question Plant agreed to sell to Bourne "24 acres of freehold land at Totmonslow in the parish of Draycott . . . . possession to be had on March 25th next. The vendor guaranteeing possession accordingly." The action was by the vendor for specific performance, and the purchaser pleaded that the contract was insufficient under the Statute of Frauds, s. 4. At the hearing the plaintiff proposed to prove that he was the owner of certain land in the parish of Draycott containing 24 acres more or less, and that on the morning of the day the contract was made the defendant, being well acquainted withthe land and being desirous of purchasing it, had by appointment gone over it with the plaintiff. This evidence having been rejected by Byrne, J., the plaintiff appealed, and the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) held the evidence admissible.

STATUTE—ACT COMMENCED UNDER STATUTE SUBSEQUENTLY REPEALED—COMPLETION OF ACT COMMENCED BEFORE REPEAL OF STATUTE AUTHORIZING IT.

Heston v. *Grout*, (1897) 2 Ch. 306, is deserving of attention, although it turns to some extent on statutory enactments not in force in Ontario. By a statute of 1875 a municipal body was authorized to give a notice to property owners to repair the street in front of their property, and in default of their executing the repairs the municipal body was empowered to perform them and apportion the expense. After the giving of the notice, the municipal body adopted another statute of 1892 which provided that after its adoption the former Act of 1875 should cease to apply, and notwithstanding this the municipal continued the proceedings commenced under the Act of 1875, and the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) agreed with North, J., that they had a right so to do even apart from the provision of a statute which expressly provided that the repeal of any Act is not to affect the previous operation of any enactments repealed, or anything duly done or suffered under the enactment so repealed. But the latter provision the Court held in any case enabled the municipal body to complete any proceeding begun under the repealed Act before its repeal.

COSTS—COMPROMISE TO DEFEAT SOLICITORS' LIEN — PRACTICE — RIGHT OF APPLICANT TO READ RESPONDENT'S AFFIDAVITS AS PART OF HIS OWN CASE.

In re Margetson, (1897) 2 Ch. 314. In this case Kekewich, J., reaffirmed the well settled rule that the parties to a litigation although at liberty to compromise their differences without the intervention of their solicitors, provided they do so honestly and without any intention to cheat the solicitors of their costs; yet wherever the compromise is effected for the purpose of cheating a solicitor, the latter will have a right to an order for payment of his costs, notwithstanding the compromise. In the present case Pugh retained Mr. Margetson to obtain the delivery of a bill of costs by Mr. Jones and a taxation thereof. Before the taxation was completed Jones, without Margetson's knowledge and with the intention of stopping the taxation and so defeating Margetson's lien for

costs, paid Pugh, who was in distressed circumstances, a small sum in settlement of the taxation, which was consequently dropped. Margetson thereupon applied to Kekewich, J., for an order to compel Jones to pay his costs up to the time of the compromise, which was granted—the Judge being of opinion that Jones as a solicitor must have known from the circumstances of Pugh that the money paid by him would not be applied towards payment of Margetson's costs. A point of practice arose also in the case which is worth notice. The case of the applicant was not made out on his own affidavits, but affidavits were filed in answer, which he claimed to be entitled to read, and which supplied what was lacking in his own affidavits. The respondents objected, but Kekewich, J., held that the applicant was entitled to use his opponent's affidavits to make out his own case.

PATENT LAW—INFRINGEMENT — FOREIGN MANUFACTURER — SENDING INFRINGING ARTICLES FROM FOREIGN COUNTRY BY POST—PLAINTIFF OUT OF JURISDICTION—JUDGMENT FOR PLAINTIFF AT TRIAL—SECURITY FOR COSTS—RETENTION OF COSTS IN COURT PENDING APPEAL.

Badische Anilin v. *Johnson* (1897), 2 Ch. 322, was an action by a plaintiff resident abroad to restrain the infringement of an English patent. The defendant was a foreign manufacturer, and the infringement complained of was his sending into England by post in response to an order from a trader in London, a parcel containing articles which were an infringement of the patent. North, J., was of opinion that the plaintiff was entitled to succeed, and he granted an injunction and an inquiry as to damages. The majority of the Court of Appeal (Lindley and Smith, L.JJ.) were, however, of the opinion that the action could not be maintained. They considered that the defendant's part of the transaction ceased when he delivered the package to the post office, and that he could not be held responsible for its being imported or carried into England. Rigby, L.J. dissented from this, and thought that the defendant was responsible for the importation of the package into England, and its carriage there as being a necessary consequence of his initial act, in depositing it in the post office for that purpose. The plaintiffs had been required to

give security for costs, and had paid money into court therefor; and on the judgment being given by North, J., in their favour, the defendants asked that the money which the plaintiffs had paid into court should be retained, pending an appeal from the judgment. North, J., granted the application on the defendants' undertaking to present the appeal within a fortnight. The plaintiffs claimed that an equal amount should be paid into court by the defendant as security for the plaintiffs' costs of the appeal, but this North, J., refused to order. The injunction and inquiry as to damages were not stayed, and the costs of the plaintiffs' solicitors were ordered to be paid upon their giving the usual undertaking to refund them in case the appeal should be successful.

MARITIME LAW—SEAMAN – MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT., C 60), S. 186—"PASSAGE HOME."

Edwards v. *Steel*, (1897) 2 Q.B. 327, is a decision of the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) affirming the judgment of Collins, J., (1897) 1 Q.B. 712, noted ante vol. 33, p. 620. Upon the appeal the plaintiff seems to have raised in addition to the point mentioned ante p. 620, that he ought to have been provided with maintenance during his journey as well as his transportation, but the Court of Appeal held that as the master had deposited the amount called for by the Consul's certificate given under clause *d.* of s. 186, the ship owners were relieved from any further liability. Their Lordships in the Court of Appeal seem, however, to have differed with Collins, J., as to the meaning of the words "a passage home," and intimate that they mean the port at which the seaman was shipped, or some port of the United Kingdom agreed to by him; but they upheld the judgment of Collins, J., on the ground that the plaintiff had agreed to go to the port to which he was given a passage.

INTERPLEADER—GOODS IN EXECUTION—ORDER FOR SALE—APPLICATION OF PROCEEDS IN DISCHARGE OF SECURITY NOT DUE—ORD. LVIII. R. 12 (ONT. RULE 1,112).

Forster v. *Clowser*, (1897) 2 Q.B. 362, was an interpleader proceeding by a sheriff, in which the goods were claimed by a chattel mortgagee whose security was not due, and which bore a high rate of interest. A Judge (Grantham, J.) in pursuance of the power conferred by Ord. lvii. r. 12 (Ont. Rule 1,112) directed a sale of the goods in question, and the application of the proceeds in discharge of the chattel mortgage, though it was not due, and without making any allowance to the mortgagee in respect of the additional interest which would have accrued had the debt not been paid off before the day appointed for payment. From this order the mortgagee appealed, but the majority of the Court of Appeal (Lord Esher, M.R., and Smith, L.J.) were of the opinion that in exercising jurisdiction under the Rule in question the Judge was not limited by the rules of equity and had a discretion to make the order he did, which under the circumstances they considered to be proper. Rigby, L.J., however, dissented. He is probably right in principle, but then the rate of interest was 60 per cent., and this is possibly an instance of a hard case making bad law.

DISCOVERY—PRODUCTION—CROWN, RIGHT OF, TO DISCOVERY.

Attorney-General v. *Newcastle* (1897), 2 Q.B. 384, was an information by the Attorney-General on behalf of the crown against a municipal corporation in which the rights of the crown to discovery are discussed. Apart from certain technical points of practice to which it is not necessary here to refer, the Court of Appeal (Lopes and Rigby, L.JJ.) on appeal from Wills, J., decided that the crown is entitled to the same rights of discovery from a subject which any ordinary litigants have against each other, but the subject has not the same right of discovery as against the crown; and furthermore that the crown in virtue of its right to discovery was entitled to the production of documents which might tend to show that the defendants had not the absolute right

which they claimed to have in the property in question. Rigby, L.J., is careful to point out that although the crown cannot be compelled to give discovery as a matter of practice, it always does so unless the public interests conflict with its doing so.

SOLICITOR—COSTS—LIABILITY OF DORMANT PARTNER FOR COSTS INCURRED AFTER DISSOLUTION BY SOLICITOR RETAINED BEFORE.

In *Court* v. *Berlin* (1897), 2 Q.B. 396, the question was whether the dormant partners of a firm were liable for the payment of costs incurred by a solicitor retained by the active partner of the firm, to collect a debt due to the firm; and whether such liability extended to the costs incurred after the firm had been dissolved, but of which as well as the existence of the dormant partners, the solicitor had no notice. A Divisional Court (Wills and Grantham, JJ.) had decided that the dormant partners were not liable for any costs incurred after the dissolution, but the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) unanimously reversed that decision. The defendants endeavoured to escape liability under the provisions of the Partnership Act, 1890 (53 & 54 Vict., c. 39) s. 36 (3), which enacts that "the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively." This Act has been held to be merely declaratory of the common law, and the answer which the Court of Appeal gave to the argument founded on this section, was, that the debt in question was contracted when the retainer was given, and therefore before the dissolution, and did not arise de die in diem, as the Divisional Court appears to have assumed. See *Friend* v. *Young* (1897) 2 Ch. 421 noted *post*.

LICENCE—REVOCATION—BREACH OF CONTRACT BY LICENSOR—LICENSEE, RIGHT OF ACTION OF.

In *Kerrison* v. *Smith* (1897) 2 Q.B. 445, the plaintiff sued for damages for breach of a contract, whereby the defendant had orally agreed to let his wall to the plaintiff for the pur-

pose of bill posting, at £2 10s. a year, the plaintiff agreeing to erect a hoarding on which the bills were to be posted. The plaintiff erected the hoarding and made several payments, and thereafter the defendant gave notice to the plaintiff to remove the hoarding, and about a month later took it down himself. The defendant contended that he had a right to revoke the licence, and that no action was maintainable, but Lawrance and Collins, JJ., held that although the permission to post the bills was a licence, and not being by deed was revocable, yet that the action for breach of contract was nevertheless maintainable, and they reversed the decision of the County Court Judge who had nonsuited the plaintiff—relying on the well known case of *Wood* v. *Leadbitter*, 13 M. & W. 838, and it is pointed out that although that case establishes the right of the defendant to revoke the licence, it does not decide that no action will lie against him for so doing in breach of contract.

MORTGAGE—POWER OF SALE.

In re Rumney and Smith (1897), 2 Ch. 351, was a case in which the question at issue was the validity of an assumed exercise of a power of sale contained in a mortgage. The mortgage was made to the trustees of a building society, and contained a power authorizing "the trustees or trustee for the time being of the society" to sell the mortgaged property. The mortgage was transferred by the mortgagees, without the concurrence of the mortgagor, to some third person, who was not a trustee of the society, and who in assumed exercise of the power of sale, offered the property for sale, and the question was raised by the purchaser at such sale whether the vendor could make a good title. Stirling, J., decided that he could not, as he was not within the terms of the power, which could not be exercised by any one except a trustee or trustees of the society, and his decision was affirmed by the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.)

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] KNOCK *v.* KNOCK. [Nov. 10, 1897.

Right of way—Easement—Winter road—Appurtenant and necessary way—Implied grant—Landlocked tenement — User—Prescription—Obstruction—Interruption of prescription—Acquiescence—Limitation of action—R.S.N.S. (5 ser.) c. 112—R.S.N.S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.

K. owned lands in the County of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway as a winter road for hauling fuel from his wood-lot to his residence at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There did not appear to be any defined form of the way across the lands more than a track upon the snow during the winter months, and it was not utilized at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute (R.S.N.S. 5th ser. c. 112) provides a limitation of 20 years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was a necessary easement appurtenant or appendant to the lands formerly held in unity of possession, which would pass by implication upon the severance of the tenements, without special grant. Appeal allowed with costs.

Wade, Q.C., for appellant. *Harrington*, Q.C., for respondent.

Girouard, J.] EX PARTE MACDONALD. [Dec. 31, 1896.

Habeas corpus—Jurisdiction—Form of commitment—Territorial division—Judicial notice—R.S.C c. 135, s. 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence therein stated to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits, and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county, entitled to return two councillors to the county council.

Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place of the offence mentioned was within the territorial extent of the police division.

Held, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in criminal cases is limited to an enquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] PAYNE *v.* CAUGHELL. [Oct. 20, 1897.

Municipal corporation—Power to lease toll road to individual—Tolls—16 Vict., c. 190, s. 26—Practice—Appeal—Divisional Court.

Under above statute a municipal corporation to which, under 12 Vict., c. 5, s. 12, a toll-road has been transferred by the Governor-in-Council, has power to lease the road to an individual who may exact tolls for the use thereof. The right is not limited to leases to toll-road companies.

Judgment of a Divisional Court, 28 O.R. 157, 33 C.L.J. 39, reversed.

Where pursuant to 12 Vict., c. 5, s. 12, the Governor-in-Council has transferred to a municipal corporation a toll-road upon which certain rates of toll are in force with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in schedule A to 12 Vict., c. 4, and the lessee can exact payment of the increased rates and is not limited to a toll sufficient to keep the road in repair.

Where the judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a Divisional Court to set aside this direction, and, by consent and without prejudice to the right of appeal,

ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court.

Robinson, Q.C., and *D. Meek*, for the appellants

J. A. McLean, and *W. K. Cameron*, for the respondent.

Moss, J.A.] IN RE SHERLOCK. [Nov. 22, 1897

Executors and administrators—Application by executor under Rule 938 (a)—Appeal to Divisional Court—Leave to appeal to Court of Appeal—Interest of executor—Reimbursement of costs—Security for costs.

Under Con. Rule 938 (a), an executor applied in Chambers by way of originating notice, and obtained a determination of a question affecting the rights of legatees under the will, which involved the construction of the will, but, upon appeal by residuary legatees, the order in Chambers was reversed by a Divisional Court, which put a different construction upon the will.

Held, that the judgment of the Divisional Court was a sufficient protection to and indemnity of the executor, and if he sought to appeal to the Court of Appeal, he must do so at his own risk as to reimbursement of the costs, in the event of failure ; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs under Con. Rules 826 et seq.

McBrayne, for the applicant. *S. Price*, for the residuary legatees.

Moss, J.A.] IN RE SHERLOCK. [Dec. 10, 1897.

Appeal—Leave — Status of appellants—Con. Rule 938—Will—Contending beneficiaries—Security on appeal.

Application by the daughters of Samuel L. Sherlock, who were the legatees interested in the bequest in question, for leave to intervene and appeal from the decision of a Divisional Court (see ante) and to dispense with the security required by Con. Rule 826.

It was objected on behalf of the residuary legatees, who opposed the application, that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under Con. Rule 938.

Held, that the question was one which a Master, by taking the accounts and making the enquiries directed to be taken and made in an administration proceeding, would have jurisdiction to deal with ; see form of administration order (No. 157) ; Con. Rule 953 ; form of Master's report (No. 84) ; and if, for the purpose of ascertaining and determining the persons to whom legacies are payable, and the amount of the legacies, it should become necessary incidentally to place a construction on the will, the Master has jurisdiction to do so ; and the test of jurisdiction under Con. Rule 938 was whether the question was one which, before the existence of the Rule, could have been determined under a judgment for the administration of an estate or execution of a trust : *Re Davies*, 38 Ch. D. 210 ; *Re Royle*, 43 Ch. D. 18.

The will having been construed in the first instance favorably to the

applicants, but in the Divisional Court adversely to them, they should not be precluded from carrying the question further, if so disposed.

Order made for leave to appeal upon security being given by bond for $200 or by paying $100 into Court.

If the appeal should proceed, the costs of the application to be costs in the cause ; if it should not proceed, the applicants to pay them.

J. H. Spence, for the applicants. *J. S. Denison*, for the residuary legatees.

Osler, J.A.] TEETZEL *v.* DOMINION CONSTRUCTION CO. [Dec. 10, 1897.

Appeal—Printed case—When ordered—Rule 802—Terms.

Except where for the convenience of the Court appeal cases ought to be printed, the Court will not, as a rule, force that course upon an unwilling appellant at the instance of the respondent, upon a motion under Rule 802 (3).

If the respondent desires to have the appeal case printed, he may have it done at his own expense ; and the appellant may be put upon terms, in the event of a further appeal by him, upon which a printed case will be necessary, as to the use of the books printed by the respondent.

Aylesworth, Q.C., for the respondent. *D'Arcy Tate*, for the appellants.

Moss, J.A.] MACDONALD *v.* CITY OF TORONTO. [Dec. 17. 1897.

Parties—Substitution of plaintiff—Class suit—Dismissal of action—Appeal to Court of Appeal—Security for costs—Time extension.

A motion on behalf of the plaintiff for an order substituting a new plaintiff for him, and extending the time for giving security for the costs of the appeal to this Court, and for delivering reasons of appeal.

The action was brought by the plaintiff, on behalf of himself and all other ratepayers of the city of Toronto, against the city corporation and R. J. Fleming, to have the appointment of the latter as assessment commissioner declared illegal, etc. On the 11th November, 1897, MEREDITH, J., gave judgment dismissing the action with costs. Notice of appeal from his decision was given by the plaintiff on the 9th December, 1897.

The plaintiff wished to be a candidate for the office of mayor or alderman for the city of Toronto at the next municipal election, and feared that the continuance of the action in his name might disqualify him as a candidate.

The application was opposed by the defendants.

Held, that where a judgment has been pronounced in favor of the plaintiff in a class action, that judgment enures to the benefit of the class, and he cannot deprive the others of that benefit ; but not so where the action has been dismissed ; the reasons which apply in favor of depriving a plaintiff of the control of a favorable judgment do not exist in the case of an adverse decision. There was no ground upon which, unless by consent of the defendants, an order for substitution could be made in this case.

The plaintiff, however, in the event of his wishing to prosecute the appeal in his own name, was allowed further time to give security and deliver the draft appeal case, together with his reasons of appeal.

Bradford, for the plaintiff

Fullerton, Q.C., and *W. C. Chisholm*, for the defendants.

HIGH COURT OF JUSTICE.

Divisional Court.] GILLARD *v.* MILLIGAN. [Oct. 25, 1897.

Assignments and preferences—Costs of first execution creditor—Lapse of execution after assignment—Right to lien, R.S.O., c. 124, s. 9.

There is nothing in the Assignments and Preferences Act, R. S. O. c 124, which supersedes the execution of a first execution creditor for his costs, or which forbids him realizing them out of the debtor's goods, notwithstanding an assignment is made. In an action by such an execution creditor, who. after assignment by the judgment debtor took no active steps to enforce his execution against the assignee and his solicitor, who has received from the estate in settlement of an action a larger sum than the amount of the costs, and applied it in payment of the assignee's costs of administering the estate and the solicitor's costs of the litigation.

Held, that as there was no fund available for division among the creditors, and as the plaintiff might have proceeded under his execution to realize his costs but did not do so, he could not recover.

Semble.—Even if he was entitled to take such a position, and to rank on the estate as a preferred creditor for the costs, he could not treat the whole assets of the estate as subject to a trust in his favor prior to any other charge. He is in no better position than other creditors proving claims, except being entitled to payment in full of the costs out of such estate funds as were divisible among creditors, that is after payment of the costs of collection and assignees' charges.

J. J. Scott, for the plaintiffs. *J. M. Glenn*, for the defendants.

Ferguson, J.] IN RE PONTON. [Oct. 29, 1897.

Life insurance moneys payable to infants domiciled outside jurisdiction—Appointment of trustee to receive the shares of infants—60 Vict., c. 36, s. 155 (2).

Upon the application of the infants who were domiciled in the State of New York with the consent of their mother, the grandfather, a resident of the Province of Quebec, was appointed trustee to receive the insurance moneys upon giving security to the satisfaction of the Registrar, the bondsmen being within the jurisdiction. The insurance company were discharged upon payment to the trustee of the moneys in their hands.

W. F. Burton, for petitioner. *F. W. Harcourt*, for infants.

Ferguson, J.] IN RE SAYLOR. [Oct. 29, 1897.

Insurance moneys—Infants—Foreign trustee—Security—60 Vict. c. 36, s. 155 (5).

The mother of infants entitled to insurance moneys, having been appointed guardian of the infants in the State of Ohio, and having given security there, was appointed trustee to receive these moneys without giving security in this Province, upon its being shown that security had been given in the foreign country to the satisfaction of the Court there, and upon its being shown that the infants resided within the jurisdiction of a foreign court.

W. F. Burton, for the insurance company, as also for the petitioner.

Meredith, J.] DICKERSON *v.* RADCLIFFE. [Oct 30, 1897.

Discovery—Patent of invention—Action to restrain infringement—Denial of right—Details of business transactions.

In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a certain patent and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right.

Held, that there being a bona fide contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their own and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary.

J. Bicknell, for the plaintiffs. *J. B. Holden*, for the defendants.

Street, J.] RE MCCAULEY. [Nov. 1, 1897.

Will—Mortmain and charitable uses Act, 1892—55 Vict. c. 20 (O).

A devise to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use" within the meaning of ss. 4 and 5 of "The Mortmain and Charitable Uses Act. 1892," 55 Vict. c. 20 (O).

Mulkern for the petitioner.

Boyd, C.] RADAM *v.* SHAW. [Nov. 1, 1897.

Trade Mark—"Microbe Killer"—Injunction.

The words "Microbe Killer" constitute a valid trade mark which is within the class of fancy names used to distinguish one article from another by the maker or inventor. And an injunction was granted at the instance of the owner of such registered trade mark to restrain its use by another.

Davis v. *Kennedy*, 13 Gr. 523 followed.

W. Nesbitt and J. R. Roaf, for the plaintiff. *McBrady*, for the defendant.

Divisional Court.] RE SHERLOCK. [Nov. 2, 1897.

Will—Devise—Debt of named amount—Debt larger than amount named—Who entitled to excess.

A testatrix to whom a debt of £290 was owing, by her will devised as follows: "The two hundred and ninety pounds due from —— and moneys in —— to be used by my executors in payment of debts —— the balance thereof to be equally divided among the daughters of S. L. S," and appointed two nephews residuary devisees. A larger sum than £290 was received after her death by her executors.

Held (reversing MEREDITH, C.J.), that as the testatrix had not given the debt in terms, but only a sum of money in terms the devise only gave the sum of money named, and not the whole debt.

Samuel Price, for the appeal. *W. S. McBrane*, contra.

Boyd, C.] ARMOUR *v.* KILMER. [Nov. 8, 1897.

Barristers and solicitors—Action for counsel fees—Liability of solicitors.

The present law of Ontario, in contrast with that of England, permits counsel to sue clients for the value of professional services. It also appears necessary, contrary again to the English rule, to hold in Ontario that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and that legal privity exists between client and counsel though a solicitor has intervened in the usual way. But the solicitor is not himself liable for counsel fees unless a bargain be made that he shall be liable, or there is evidence to show by a course of dealing or otherwise, that credit was given to the solicitor and not to the client.

H. Mickle, for plaintiffs. *Lindsay*, for the defendants.

Rose, J.] SUTHERLAND *v.* DANGERFIELD. [Nov. 17, 1897.

Mortgage—Second mortgagee and owner of equity of redemption—Right to recover value of timber cut.

The assignee of a second mortgage, who had acquired the equity of redemption to the land, but who had never been in possession, nor entitled to do so, the first mortgage being in arrears, and the land not of sufficient value to pay it off, cannot maintain an action to recover the value of timber cut by a person, acting under an agreement made with the consent of the first mortgagee by the mortgagor's wife, who had not barred her dower in either mortgage, and was in possession of the land.

D. B. Maclennan, Q.C., for plaintiff. *B. M. Jones*, for defendant.

Street, J.] MCCANN *v.* CITY OF TORONTO. [Nov. 20, 1897.

Municipal corporation—Accident—Liability—Relief over.

Before a building which was being erected for a city, had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person on the street below. The trap door was a necessary part of the contract, which required all work to be done in a good, workmanlike manner, and imposed responsibility on the contractors for all accidents which they might have prevented. Damages were recovered against the city on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings. The city having paid the damages, sought to recover same from the contractors, who, in the action against the city, had been brought in as third party defendants, but on the terms that the findings in such action should be binding on them only as to the amount of damages, and that the question of their liability be afterwards tried.

Held, that under the circumstances the recovery over against the contractors could not be maintained.

Fullerton, for the City of Toronto. *James Jones*, for the contractors.

Meredith, C.J.] HEATON *v.* FLOOD. [NOV. 20, 1897.

Chattel mortgage—Omission to renew—Mortgagee taking possession—Sufficiency of—Seizure by execution creditor—57 Vict., c. 37, ss. 38, 40 (O.)

A mortgagee having omitted to renew a chattel mortgage, issued and delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining premises, taking from them an instrument under seal whereby they acknowledged that they had received the goods, and undertook to deliver them to the bailiff when demanded. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question.

Held, that the possession to be effective must be an actual and continued charge of possession, and that what took place here did not constitute such a possession

Quære whether, in any event, the taking of possession after the time for renewal had expired, could validate the mortgage.

A creditor, prior to the placing of his execution in the sheriff's hands, has no locus standi to attack the mortgage.

Clarkson v. *McMaster*, 25 S.C.R., 32 C.L.J. 71, commented on.

Secs. 38 and 40 of 57 Vict., c. 37 (O.) do not apply.

M. Wilson, Q.C., for the plaintiffs. *F. A. Anglin*, for the defendants.

Boyd, C.] STEWART *v.* MILLAR. [Nov. 22, 1897.

Insolvency—Assignee for benefit of creditors—Action against, for account—Assignee's compensation—Payments to inspectors—Solicitor's bill.

An action brought by J. A. Stewart, on behalf of himself and all other creditors of William Southcott, an insolvent, against James Millar, assignee, under R.S.O. c. 924, of the estate of William Southcott, to compel the defendant to carry out the trusts of the deed of assignment and the winding-up of the insolvent estate under the advice and direction of the Court.

Held, as to the compensation of the assignee, the amount received by him being only $46, that if the plaintiff was dissatisfied with this, his proper course, as pointed out in s. 11 (2) of R.S.O. c. 124, was to apply in a summary way to the Judge of the County Court to have it reviewed and readjusted ; but it should not be made the subject of litigation in the High Court.

2. As to the amount paid to the three inspectors, $60, that appeared to be an unauthorized payment. No travelling expenses were incurred, and under s. 11 (3) no other allowance is to be made to the inspectors except upon a resolution of the creditors. There was no such resolution ; and, although steps might yet be taken to legalize what had been done, the defendants had

not at present properly accounted for this disbursement. Unless the body of creditors should, at a proper meeting, ratify what had been done, or in so far as they should fail to do so, the defendant would have to account for this item.

3. As to the solicitor's bill, there was no need to bring an action, as the solicitor was subject to the summary jurisdiction of the Court, of which he was an officer, and liable to have his bill taxed; and the proper course was to apply for taxation.

H. Collins, for plaintiff. *P. Holt*, for defendant.

Falconbridge, J.] BARBER *v.* CRATHERN. [Nov. 27, 1897.

Assignment by insolvent—Security—Preference—Attack by creditor—Right of an attacked creditor to share in proceeds.

When proceedings are taken under sec. 7, sub-sec. (2) of R.S.O. c. 124, by a creditor on behalf of himself and all those who within a limited time should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security join with the attacking creditor in indemnifying the assignee, so that in the event of his failing to retain his security he may participate in the fruits of the litigation.

E. Saunders, for the petitioner. *Shepley*, Q.C., for the plaintiff. *Wm. Macdonald*, for the defendant.

Ferguson, J.] IN RE NORRIS. [Nov. 29, 1897.

Assessment and taxes—Vacant tenement—Remission of taxes—Petition—Court of Revision—55 Vict. c. 48, s. 67—Mandamus.

Motion on behalf of the estate of James Norris and of the Canadian Bank of Commerce, for an order in the nature of a mandamus to the Court of Revision for the city of St. Catharines to entertain and hear a petition of the applicants. The applicants were the owners of two separate properties in the city of St. Catharines, called Mill "A" and Mill "B", which properties were assessed under their names respectively. Mill "A" had been vacant and unused for three years, and was assessed at the value of $25,000. Nothing was asked in respect of Mill "B." The petitioners by their petition asked that the taxes, or a substantial part thereof, on "Mill "A" for 1897 should be remitted.

By s. 67 of the Consolidated Assessment Act, 1892, 55 Vict. c. 48, "the Court shall also, before or after the 1st day of July, and with or without notice, receive and decide upon the petition from any person assessed for a tenement which has remained vacant during more than three months in the year for which the assessment has been made . . . and the Court may, subject to the provisions of any by-law in this behalf, remit or reduce the taxes due by any such person, or reject the petition; and the council of any local municipality may, from time to time, make such by-laws, and repeal or amend the same."

The objection of the Court of Revision was that no by-law had been passed on the subject, and, in their opinion, they could not act under the section until a by-law had been passed. There was to be another session of the Court for the year 1897.

D. L. McCarthy, for the applicants.

No one appeared to show cause, although all the members of the Court of Revision and the solicitor for the town of St. Catharines were served with notice of the application.

FERGUSON, J.—Mill "A" is a tenement, and has been unoccupied more than three months of the year 1897. I am of the opinion that the Court of Revision is obliged to receive and decide upon the petition, and that the fact that the municipality has not passed any by-law on the subject does not relieve the Court from the performance of this duty. If a by-law on the subject existed, the action of the Court would be subject to the provisions of it; but when there is no such by-law, the action of the Court will simply be independent of any such provisions; their duty is to receive and decide upon the petition. The Court of Revision stands in a position such as that of a public officer having a public duty to perform, and the petitioners are citizens having an interest in the performance of that duty. I am of the opinion that the affidavit of Mr. Collier, unanswered, shows a sufficient demand and refusal. I think the order for the mandamus should go.

Ferguson, J.] [Dec. 3, 1897.

BARTRAM *v.* LONDON FREE PRESS PRINTING CO.

Security for costs—Libel—Newspaper—R.S.O. c. 57, s.9—Contentious affidavit in answer.

Upon an application for security for costs made under R.S.O. c. 57, s. 9, by the defendant in an action for an alleged libel contained in a public newspaper, the plaintiff desired to read and have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendants on which the motion was based, and contended that the object was not to try the facts on affidavits, but to show that the agent had not knowledge of the facts, that many statements made by him were not true, and therefore that his affidavit was not such as is required by s. 9.

Held, that the plaintiff's affidavit could not be read or used upon the application.

The plaintiff in person. *A. B. Cox*, for the defendants.

Meredith, J.] IN RE MATHERS. [Dec. 6, 1897.

Infant—Trust fund—Payment to guardian—Trustees under will—Application for advice—R.S.O. c. 110. s. 37—Payment into Court.

Where an infant had become entitled to a fund, the subject of an express trust in her favour under a will, and the fund was claimed in the infant's name by her guardian appointed by a Surrogate Court, but the infant, represented by the official guardian, opposed the claim,

Held, that it was not a case in which an order should be made under R.S.O. c. 110, s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but that the trustees should be allowed to transfer the fund into Court.

Huggins v. *Law*, 14 A.R. 383, distinguished.

A. Hoskin, Q.C., for the applicants. *W. M. Douglas*, for the statutory guardian. *W. Davidson*, for the infant.

Rose, J.] HERMAN *v.* MANDARIN GOLD MINING CO. [Dec. 7, 1897.

Notice of trial—Irregularity—Close of pleadings—Service of papers—Waiver.

Appeal by the plaintiff from an order of the Master-in-Chambers striking out the notice of trial on the ground that the pleadings were not closed when the notice was served.

On the last day for delivering the statement of defence, which was also the last day for serving notice of trial for the Rat Portage Assizes, the defendants filed their defence a few minutes before four o'clock, and served it at the office of the plaintiff's solicitor about the same time. The plaintiff immediately filed a joinder of issue, and then served it and also notice of trial, before four o'clock, on the clerk of the defendants' solicitor, in Osgoode Hall. On the same day, but before the defence was filed, the plaintiff also served the joinder and notice of trial at the office of the defendants' solicitor.

Held, that the notice of trial was irregular, for it could not be properly served until after the close of the pleadings; and the service upon the clerk at Osgoode Hall was of no avail; it could only be effective, if at all, from the moment when it reached the solicitor himself. *McIlroy* v. *McIlroy*, 14 P.R. 264, followed, in preference to *Broderick* v. *Broatch*, 12 P.R. 561.

Held, also, that the issuing by the defendants of an order to produce at the same time that they filed their defence did not waive the irregularity of the notice of trial.

J. D. Edgar, Q.C., for plaintiff *Masten*, for defendants.

Meredith, C.J.] IN RE LOTT *v.* CAMERON. [Dec. 9, 1897.

Division Court—Action for balance of unsettled account—Liquidated claim—Prohibition.

Motion for prohibition. The plaintiff sued in the Division Court for a balance exceeding, with interest added, $100, of a debit and credit account, the debit items of which exceeded in all $400.

Held, that for all that appeared on the claim, the account though exceeding $400 may have been a settled account, and the balance an agreed or admitted balance, and therefore, want of jurisdiction under R.S.O. c. 51, s. 77, could not be said to appear on the face of the proceedings, and the granting of prohibition being therefore discretionary, it should not be granted, on this ground, in this case.

Held, however, that as the amount of the claim was not ascertained by the signature of the defendant as required by s. 70, sub sec. 1, clause 3, it did

appear on the face of the proceedings that the amount claimed was beyond jurisdiction, but the claim for interest ($14.73) was severable, and prohibition could be limited to that part of the claim which brought it over the $100

Holman, for the defendant. *J. H. Moss*, for the plaintiffs.

Meredith, C.J., Rose, J. / Macmahon, J. BROCK *v.* TEW. [Dec. 13, 1897.

Pleading—Embarrassment—Prolixity—Tendering issue—Striking out.

An appeal by the defendant in two actions brought by the same plaintiffs, in respect of different estates assigned for the benefit of creditors to the defendant, from an order of Falconbridge J., in Chambers, affirming an order of the Master-in-Chambers striking out the 10th and 11th paragraphs of the statement of defence.

The actions were brought by creditors against the assignee for an account, and to obtain dividends upon the estates. The two paragraphs in question set up that the defendants had offered to pay dividends upon certain terms, and set out at great length the correspondence and disputes between the solicitors in relation to such terms.

R. McKay, for the defendant, cited *Stratford Gas Co.* v. *Gordon*, 14 P.R. 407, and *Bank of Hamilton* v. *George*, 16 P.R. 418. *H. Cassels*, for the plaintiffs, contra.

The Court held that the paragraphs in question tendered no issue, and that prolix pleading of this kind should be discouraged.

Appeal dismissed with costs to the plaintiffs in any event.

Meredith, C.J.] FITCHETT *v.* MELLOW. [Dec. 13, 1897.

Way—Easement—Way of necessity—Physical inaccessibility—Convenience.

The defendants in an action for trespass to land set up that a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they contended that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of ultilization without an unreasonable expenditure of money, and not sufficient for the reasonable purposes of the owner of the lands.

Held, that this contention was not maintainable.

The appellation "a way of necessity" indicates that it is founded on necessity, not on convenience. Some confusion has arisen upon the authorities from failing to distinguish between a way of necessity, properly so called, and quasi-easements which pass or are reserved under certain circumstances, where the reasonable enjoyment of the land with which they have been held to pass, could not be had by the grantee if they did not pass with the land.

Dictum of Lord Mansfield in *Morris* v. *Edgington*, 3 Taunt. at p. 31, and of Bowen, L.J., in *Bailey* v. *Great Western R.W. Co.*, 26 Ch. D. at p. 453, referred to.

The foundation of the right to a way of necessity is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

Clute, Q.C., and *U. M. Wilson*, for the plaintiff. *W. R. Riddell* and *G. F. Ruttan*, for the defendants.

Ferguson, J.] VIDEAN *v.* WESTOVER. [Dec. 13, 1897.

Life insurance—Benefit certificate—"Ordinary beneficiary"—Reapportionment by will—Validity—60 Vict., c. 36, ss. 151, 159, 160—Retroactivity.

The life insurance certificate on its face made the sum of $500 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred before the passing of 60 Vict., c. 36 (O.)

Held, that ss. 151, 159, and 160 of that Act applied to the certificate and declaration made by the will, and by those sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary," and the reapportionment made by the will was valid.

C. J. Holman, and *H. J. Dawson*, for the plaintiffs. *Tremeear*, for the defendant.

Armour, C.J., Falconbridge, J., Street, J. [Dec. 15, 1897.

GOSSLING *v.* MCBRIDE.

Arrest—Ca. sa.—Discharge.

Where a debtor is in custody under a writ of ca. sa., the Court cannot make an order for his discharge except under the Indigent Debtors' Act.

G. W. Lount, for the defendant. *D. Armour*, for the plaintiff.

Divisional Court.] REGINA *v.* WALSH. [Dec. 16, 1897.

Liquor License Act—Treating on Sunday—"Other disposal"—Offence—R.S.O. c. 194, s. 54.

Treating or giving liquor to friends by a landlord in his licensed premises on a Sunday is an offence under above enactment, and such treating or giving is covered by the words "other disposal" as used in that section.

Haverson, for the motion. *Langton*, Q.C., contra.

Meredith, J.] [Dec. 17, 1897.

STYLES *v.* THE SUPREME COUNCIL OF THE ROYAL ARCANUM.

Life Insurance—Action—Time—Ontario Insurance Act, 60 Vict., c. 36, s. 148 (2)—Enabling statute.

The words of s. 148 (2) of the Ontario Insurance Act, 60 Vict. c. 36, "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue

of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment.

D. B. Maclennan, Q.C., and *Adam Johnston*, for the plaintiffs.

Aylesworth, Q.C., and *D. F. MacWatt*, for the defendants.

Boyd, C., Ferguson, J., Robertson, J. } LEA *v.* LANG. [Dec. 18, 1897.

Security for costs—Application to set aside—Terms—Payment of costs—Form of order—Dismissal of action.

An appeal by the plaintiff from an order requiring him to give security for costs upon the ground that the costs of a former action brought by plaintiff against defendant for the same cause, were unpaid, was dismissed by a Judge in Chambers, and a further appeal by a Divisional Court, which held (17 P.R. 203, 32 C.L.J. 560) that the plaintiff could not answer the application by showing that the former action was brought without his authority. The costs of the appeals were made payable to the defendant in any event. The plaintiff, upon application in the former action, then had the judgment for costs against him therein set aside, upon the ground that the action was brought without his authority ; and afterwards applied to set aside the order for security for costs.

Held, that the Master-in-Chambers, in setting aside the order for security for costs, had discretion to impose terms, and the terms imposed, viz., payment by the plaintiff of the costs of obtaining the order of security, of the appeals therefrom, and of the application itself, were competent and proper.

As to the form of the order, a dismissal of the action, in the event of security not being given within a limited time, was authorized by Con. Rules (1888) 1243 and 1246.

N. F. Davidson, for the plaintiff. *Aylesworth*, Q.C., for the defendant.

Boyd, C., Ferguson, J., Robertson, J. } [Dec. 18, 1897.

CLARRY *v.* GRAND TRUNK R. W. CO.

Railways—Passenger—Contract to carry—Continuous journey—Break in railway—Omnibus transfer—Refusal to carry—Damages—Costs.

The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford, via Galt and Berlin. There was a break in the line of the defendants at Galt, where the river had to be crossed, the distance between the stations being three-fourths of a mile. The defendants advertised that there was an omnibus transfer at Galt. The plaintiff was asked to pay a fare of ten cents for the omnibus at Galt, but refused to do so, and was not permitted to be transported free from station to station. He failed to make his connection, and brought this action for damages.

Held, that the import was that the passenger was to be carried the whole distance; he was not called on to walk, and it was the business of the defendants to see that he was conveyed this distance free of expense.

Held, however, that it would have been reasonable for the plaintiff to have paid the ten cents and made his connection, and the damages should be restricted to that sum.

Hawkins v. *Great Northern R. W. Co.*, 1. H. & N. 408; *Hobbs* v. *London and Southwestern R. W. Co.*, L.R. 10 Q.B. 111; *Craig* v *Great Western R W. Co.*, 24 U.C.R. 509; and *Knight* v. *Pollard*, 56 Me. 241, referred to.

Held, also, that the plaintiff was entitled to costs, as the action was brought to test a right.

J. Bicknell, for the plaintiff. *W. Nesbitt*, for the defendants.

Boyd, C., Ferguson, J. } MILES *v.* ANKATELL. [Dec. 18, 1897.
Robertson, J. }

Fixtures — Wooden building—Removability — Mode of use—Constructive attachment to soil.

In an action upon a mortgage the plaintiff claimed foreclosure and a declaration that a certain erection upon the mortgaged premises, placed there by one of the defendants, the husband of the owner of the equity, was affixed to the freehold and part of the mortgage security.

The building in question was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil, which was perhaps somewhat levelled to make a foundation for it. It was first used as a shop or store, and then turned into a dwelling house, and this was rented for a while by the mortgagor and her husband. The building could easily be moved, and little or no injury done to the soil.

Held, that it was not in fact affixed or annexed to the soil, but was merely a chattel which might be moved at any time: *Wansbrough* v. *Malins*, 4 A. & E. 884, and *Wiltshear* v. *Cotterill*, 1 E. & B. 689.

If it was a chattel, then, according to the rule suggested in *Holland* v. *Hodgson*, L. R. 7 C. P. 334, 335, the onus was on the plaintiff to show that it could not or ought not to be removed as against him. So far he showed nothing, and the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the conclusion that it was to be deemed constructively attached to the freehold.

W. J. Clark and *G. H. Galbraith*, for appellant. *J. Bicknell*, for plaintiff.

Rose, J.] ALEXANDER *v.* IRONDALE, &C., R. W. CO. [Dec. 18, 1897.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

In an action against an incorporated company to recover a money demand, the defence was that the indebtedness, if any, was not that of the company, but of the president in his private capacity. Upon an application for a better adffiavit on production of document from the company, it had been determined that the company had no documents to be produced.

Held, that upon the examination for discovery of the president as an officer of the company, he could not be compelled to produce documents or books which had been determined not to be in possession of the company, nor his own books or documents; and a subpœna served upon the president was set aside quoad the production of documents which it called for.

Steel v. *Savary*, (1891) W.N. 195, and Snow's Annual Practice, 1897, p. 650 et seq., referred to.

W. H. Blake, for the defendants. *A. C. McMaster*, for the plaintiff.

Boyd, C.] MORPHY *v.* FAWKES. [Dec. 20, 1897.

Costs—Scale of—Action to set aside fraudulent conveyance—Amount.

An action by simple contract creditors, the amount of whose claim was less than $200, suing on behalf of themselves and all other creditors, to get judgment and equitable execution against the lands of the debtor conveyed to a third person in alleged fraud of creditors. It appeared that the land was worth more than $200, and that the claims of execution creditors exceeded $600 in the aggregate.

Held, that the amount of the subject matter involved exceeded $200, and the costs should be taxed on the higher scale.

Hall v. *Pilz*, 11 P. R. 449, *Dominion Bank* v. *Heffernan*, ib., 504, and *Forrest* v. *Laycock*, 18 Gr. 611, followed.

B. E. Swayzie, for the defendants. *W. R. Smyth*, for the plaintiffs.

Boyd, C., Ferguson, J., Robertson, J. } REGINA *v.* CONLIN. [Dec. 22, 1897.

Criminal law—Larceny from person—Sentence—Police magistrate—Jurisdiction—Consent—Criminal Code, ss. 344, 783, 785, 787.

The charge against the defendant was that he, at the city of Hamilton, did unlawfully steal one purse containing $3.48 in money.

The defendant consented to be tried and was tried before the police magistrate for the city of Hamilton. He pleaded guilty, and was sentenced to three years' imprisonment.

On the return of a habeas corpus it was contended on behalf of the defendant that there was no power to impose on him for the offence a sentence in excess of that provided for by s. 787 of the Criminal Code, namely, imprisonment for a term not exceeding six months.

The contention on the part of the Crown was that the case did not fall under the provisions of s. 787 or 783, but under s. 344, and that the punishment for it might have been as great as fourteen years' imprisoment.

Held, that the fact that "larceny from the person" is omitted from clause (a) of s. 783, leaving that offence specifically provided against by s. 344, indicates an intention to have the offence punishable under s. 344, which is the section applicable to the case here; but if there was any conflict or difference between s. 783 and s. 344, tne specific provisions in s. 344 would prevail over any general provisions in the other section.

And the offence being thus one to be dealt with under s. 344 the Court of General Sessions of the Peace would have jurisdiction, and the police magistrate the same jurisdiction, under s. 785, there being the consent of the defendant.

Du Vernet, for the defendant. *J. R. Cartwright*, Q.C., for the Crown.

COUNTY COURTS.

COUNTY OF YORK.

HARRIS *v.* CANADA PERMANENT L. & S. CO.

Landlord and tenant—Distress—Exemptions—R.S.O, 1887, c. 143, s. 27—55 Vict., (O.) c. 31.

In 1897 a landlord distrained furniture of a monthly tenant in arrear for eighteen months rent. The furniture would have been exempt if seized under execution, and also under R.S O. c. 143, s. 27, if seized for rent. In case of a monthly tenacy 55 Vict. c. 31 (O.) purported to amend the section with respect to such exemption. The tenant moved for an injunction to restrain sale. The motion was granted upon the ground that the language of the amendment 55 Vict. c. 31 (O.) is insensible and inoperative, and R.S.O. c. 143, s. 27 is not thereby cut down.

[TORONTO, Nov. 2, 1897.—MCDOUGALL, Co. J.

This was an application for an injunction. The facts of the case sufficiently appear in the judgment.

MCDOUGALL, Co. J.—This is an application for an injunction to restrain the sale of certain goods seized under a landlord's warrant. The parties are agreed that I shall determine the whole matter summarily, as all facts necessary to conclusion have been put in before me on this motion, and the plaintiff's rights depend entirely upon the construction to be placed on the language of R S.O. c. 143, s. 27, as amended by 55 Vict., c. 31 (O).

Section 27 as amended by this latter Act reads as follows:

"The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect to a tenancy created after the first day of October, 1887, except as hereinafter provided; nor shall such goods be liable to seizure by distress by a collector of taxes accruing after said 1st October, 1887, unless they are the property of the person actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor; provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent."

The question is what do the words of the amendment, "Provided that in the case of a monthly tenancy such exemptions shall only apply to two months arrears of rent" mean.

The law of landlord and tenant as it stood before the passage by the Legislature of s. 27 of R.S.O. 143 allowed the landlord under his warrant of distress to take all goods found on the demised premises. This was the harshness of the common law, and it had prevailed for a long series of years. The tenant had no exemption save that the landlord could not take the beast

off the plough at work, articles in actual use at the time of seizure and certain similar exceptions, allowed, it is believed, solely because the taking under certain circumstances might lead to a breach of the peace. The more humane tendencies of modern times were expended in many directions and for many years, before the harsh law in favor of the landlord was approached. It was not until 1887, by 50 Vict., c. 23, s. 1 (O.) that our Legislature made a sweeping change, and placed all tenants whose tenancy commenced after 1st of October, 1887, upon the same footing as other debtors, and declared that the goods and chattels exempt from seizure under execution should not be liable for seizure under distress for rent. This broad remedial enactment continued in force until 1892, when the amendment which is now under consideration in this case was made, but purported to apply only to monthly tenancies. In the present case the tenancy was a monthly one. There was about eighteen months rent in arrear at the date of the seizure. The goods seized it is admitted are goods which would be exempt from seizure under execution. Are they exempt from seizure by distress under the provision of the statute, or if not what are the tenant's rights?

The first point to be noticed in the confusing language of the proviso is that it states in a case of monthly tenancies, "such exemptions shall only apply to two months' arrears of rent." Now, the exemption spoken of in s. 27 does not apply to rent, but to goods. There is no such thing as an exemption applying to arrears of rent. The original section, remedial and clearly expressed, gives to every tenant the right to claim all his goods as exempt from distress which would be exempt under execution. Has the proviso of 1892 cut down by clear and intelligible language this clearly expressed right? Does the clause mean that a tenant can claim for his goods exemption only where he is exactly two months in arrears with his rent; that if he be only one month in arrear or three months in arrears he can claim no exemption at all? It is argued that as the proviso takes away from monthly tenants a right which is not affected in the case of tenants holding by the week or quarter or year, such an intention must be expressed in most clear and positive language, otherwise it will not be inferred that the Legislature intended to deal so hardly with a particular class of tenants as distinguished from all other tenants.

Again, if it is meant that to the extent of two months arrears, i.e., one month or two months, but not exceeding two months, the tenant is to have the benefit of the original exemption of certain of his goods from seizure, does it mean that when his arrears of rent exceed two months he is to have no exemption whatever? In other words, is a monthly tenant, in arrear for more than two months, to be viewed as if still under the old common law and liable to have the bed taken from under his sick wife or child, and even his own clothing, or those of his wife and children, taken, if not in actual use at the time of the seizure? Or does it mean, though I see no authority in the language for this latter view, that he is entitled to claim as exempt goods to the value of two months' rent? Or does it mean that all the goods may be sold and he entitled to claim out of the proceeds money to the extent of two months' rent? Is it possible to put a fair and reasonable interpretation upon the language of

the Legislature which can be given effect to? I cannot, I confess, gather the intention. If I am unable to ascertain with reasonable clearness the intention from the language used, I am not allowed to supply a meaning or guess it. As said by Grove, J., in *Richards* v. *McBride*, 8 Q.B.D. 122: "We cannot assume a mistake in an Act of Parliament. If we did so we should render many Acts uncertain by putting different constructions upon them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the Legislature to amend it."

I am unable to say from the language used in this proviso what limitations the Legislature intended to put on a monthy tenant's right to exemption for certain of his goods when sought to be taken by a distress for rent. Rather than guess at its meaning it is better to say that the words have no meaning at all. I must, therefore, hold that this tenant's goods were exempt from seizure at the time of this distress, and that the plaintiff is entitled to his order for an injunction.

A. F. Lobb, for plaintiff. *R. B. Beaumont*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] TOWN OF AMHERST *v.* FILLMORE [Nov. 5, 1897.

Municipal law—Remuneration of councillors—Recovery of money drawn as salary.

This case was tried before Townshend, J., at Amherst. Oct, 1897. The defendant was a member of the town council of Amherst in 1891. The council passed a resolution for the payment of a salary of $100 to each of the councillors and defendant received said sum. Ss. 68, 81 and 269 of the Towns' Incorporation Act, 1888 gives the council power to provide for the salaries and emoluments to be paid to "the officers" of the town. The town brought an action against the defendant to recover the money paid as salary to defendant as councillor, and the defendant pleaded the resolution of the council under which the payment was made.

Held, that a councillor was not an "officer" of the town within the meaning of the Act; and that the town was entitled to recover the money.

TOWNSHEND, J., in giving judgment said, "One cannot shut their eyes to the strong reasons for debarring a body corporate for municipal purposes voting money to themselves or in any way being interested in municipal contracts. Practical experience has proved it to be a source of corruption and weakness. Public policy is against it. If the council could vote themselves $100 they might with equal right vote $1,000 or even more and the citizens would be without remedy. The authorities are numerous and consistent on this subject and it will therefore be unnecessary for me to go through them with any

detail. I may, however, cite a short extract from the judgment of Burns, J., in *Municipal Council of Nissouri* v. *Horseman*, 16 U.C.R., at p. 388: 'The members or councillors comprise the council and not the corporation—they are agents of the corporation for the management of the affairs and funds of the corporation. When these agents have been proved so to misappropriate the funds or to put money into their own pockets, I think an action will lie against them to recover it back.'"

Townshend, Q.C., and *Borden*, Q.C., for plaintiff.

Dickey, Q.C., for defendant.

Full Court.] THE QUEEN *v.* HORTON. [Dec. 13, 1897.

Criminal Code, ss. 501, 872 (b)—Wilfully killing a dog—Conviction—Adjudging payment of a money penalty, and in default, imprisonment with hard labor—Condition not to prosecute.

The defendant H. was found guilty under s. 501 of the Criminal Code of the offence of wilfully killing a dog, and was adjudged to pay a penalty of $10 and $30 compensation and costs, and in default of payment, forthwith to be imprisoned for the period of three months with hard labor. Under the provisions of section 501 a person found guilty under it is liable (1) to a penalty not exceeding $100 over and above injury done, or (2) to three months' imprisonment absolute, with or without hard labour.

Held, that the conviction was bad for imposing imprisonment with hard labour under the Code, s. 872, sub-sec. b., in default of payment of the fine, and that defendant was entitled to a writ of habeas corpus for his discharge on giving an undertaking that no action should be brought against anyone on account of the proceedings taken. See *R.* v. *Turnbull*, 16 Cox C.C. 110.

Held, that when the justice came to make the conviction and to provide for the enforcement of the money penalty he should have had recourse to s. 872, sub-sec. b., which deals with this matter, and supplies the limits and manner of imprisonment which may be imposed in default of payment of a money penalty, and could not award hard labor.

J. J. Power, for prisoner. *J. F. Frame*, for complainant.

Meagher, J.] IN RE BAILLIE.

Insolvent estate—Remuneration to trustees—Leave to creditors to come in and sign deed after expiry of time fixed for that purpose—Costs.

On application by trustees for creditors, under assignment dated January 20th, 1897, to have their remuneration fixed, it appeared that the assets realized $14,680 04, that the amount paid creditors was $13,058, and that the balance remaining on hand was $1.621.61.

Held, that the sum of $700 was a reasonable allowance to the trustees.

The deed provided that after payment of preferred creditors the balance should be distributed among such other persons being creditors as should become parties to the deed by executing it within ninety days from date.

Held, notwithstanding the expiry of the time, that leave should be given

to S. & Co., creditors, to come in and execute the deed, it appearing that they had remained passive, and that they had not acted in a hostile manner, and that no prejudice could arise from such permission. But

Held, that as the delay was deliberate the permission sought should only be given on payment of costs, which, for the purpose, were fixed at $5.

Province of New Brunswick.

SUPREME COURT.

Forbes, J., At trial. } MILLER *v.* MCPHERSON. [Oct. 26.

Trover—Agreement for sale—Registration.

The defendant took from one C. W. a chattel mortgage on a number of articles, including a wagon, which C. W. obtained from the plaintiff under the following agreement:

I reside at Fredericton, in the County of York, and I hereby agree with Eben Miller & Co. . . . that the title, ownership and right to possession of the 3-spring butcher express wagon, for which I have this day given them my promissory note numbered 13, shall remain in the said Eben Miller & Co. until the said promissory note and any renewal or renewals thereof are fully paid.

Dated 4th August, A.D. 1896. (Sgd.) C. W.

And afterwards seized and sold the property, including the wagon.

Held, in an action of trover that the agreement was not one requiring registration under the Bills of Sale Act, there being no transfer of property from the plaintiff to C. W.

Oswald S. Crocket, for plaintiff. *C. E. Duffy*, for defendant.

Full Bench.] EX PARTE HEBERT. [Nov. 6, 1897.

Liquor License Act—Discretion of the Board of Commissioners.

On application for a license under the Liquor License Act of 1896, the Board of Commissioners of their own motion took objection to the granting of a license to the applicant on the ground that he had previously sold liquor without license, and notified him to appear and answer the objection. At the time fixed for the hearing the applicant appeared, but the Board declining to hear him in answer to the objections thus raised, refused to grant the certificate for a license on the ground that the notice published by the inspector designating the premises of the applicant did not describe them with sufficient certainty, and directed him to make a new application.

Held, on an application for a mandamus to compel the Board to issue a certificate for a license, following *Ex parte Mayberry* and *Rogers*, 33 C.L.J. 505, that the Court could not control the discretion of the Commissioners in refusing to grant the certificate, but that, had the application been for a mandamus to compel them to hear and decide upon the objection which they had raised as to his having sold liquor previously without license, the rule would have been granted.

J. D. Phinney, Q C., for applicant. *White*, Attorney-General, contra.

Full Bench.] CLAIRE *v.* LYNOTT. [Nov. 12, 1897.

Witness disobeying a subpœna.

Application for a rule nisi for an attachment against J. L. for disobeying a subpœna. The affidavits disclosed that he lived twenty miles from the court house, and was tendered and accepted $2.25 conduct money, which the Court was of opinion was not sufficient to cover his expenses.

Held, however, that, having accepted the money without objection to the sufficiency of the amount, he should be called on to show cause.

Oswald S. Crocket, for defendant, the applicant.

Full Bench.] [Nov. 16, 1897.

EX PARTE RAYWORTH.

Canada Temperance Act—Adjournment—Day of week or month.

The magistrate adjourned the hearing of a C.T.A. case to Tuesday, December 28th, when Monday was in fact the 28th and Tuesday the 29th December, and on the latter day entered a conviction, the defendant not having appeared either on the return of the summons or on the day of conviction.

Held, that the day of the week governed, and that the conviction was properly made on Tuesday, December 29th.

Rule for certiorari discharged.

D. Grant, in support of rule.

J. W. McCready, contra.

Full Bench.] SMITH *v.* ST. JOHN CITY RY. CO. [Dec. 8, 1897.

Consolidation of suits—Sufficiency of order for.

The Imperial Trusts Co. by petition to Harrington, J., sitting in equity, prayed for directions as to the distribution of $15,360.85 which had been paid over to them out of the funds deposited with the Receiver-General to the credit of these suits. In his order or decree on this petition Judge Harrington declared that these suits by order of the Court in equity on the 26th day of October, 1893, had been consolidated and directed that all costs in connection with the same be taxed on the basis of such consolidation. On appeal from

this decree the only record relied on in support of the contention that the suits were consolidated was the following declaration of the learned Judge contained in the stenographer's notes of the proceedings, and made on the 26th October, 1893: "All consolidated cases and matters to be hereafter considered together, the official stenographer, to notify all parties of this."

Held, per TUCK, C.J., and LANDRY, J. (VANWART, J., dissenting), that the above, informal as it was, was a sufficient order of consolidation, particularly as no one objected to it, and so many other matters in the same cases had been done by consent of counsel in a similarly informal way.

Appeal dismissed with costs.

Pugsley, Q.C., for appellants. *H. H. McLean*, contra.

Barker, J.
In Equity,

THIBAUDEAU *v.* SCOTT. [Dec 10, 1897.

Security for costs—Plaintiff residing abroad—Third party interested.

The plaintiff, residing at Montreal, obtained a judgment in the Supreme Court of New Brunswick on July 16th, 1897, for $952.65 against the defendant S., and brought a suit in equity to set aside a bill of sale given by S. to the other defendants a few days previous to the date of the judgment. The defendants, including S., applied for security for costs. For the plaintiff it was argued that the security should not be for the benefit of S. on account of the judgment debt due by him to the plaintiff.

Held, on the authority of *Crozat* v. *Brogden*, (1894) 2 Q.B. 30, that the security should be for the benefit of S. as well as the other defendants.

A. H. Hanington, Q.C., for application. *H. F. Puddington*, contra.

EXCHEQUER COURT—ADMIRALTY DISTRICT.

McLeod, J.] PALMER *v.* SHIP "FRED E. SCAMMELL." [Nov. 20, 1897.

Ship—Action of restraint—Minority owner—Charter party.

The managing owner of a vessel entered into a charter on July 9 to load with lumber from a New Brunswick port for the United Kingdom, and brought the vessel to New Brunswick for that purpose. While loading in pursuance of the charter the vessel was arrested in November in an action of restraint by a minority owner, who, however, had no real interest in the shares, and was under an obligation to transfer them to the beneficial owner upon request. On an application by the managing owner and other co-owners for the release of the vessel:

Held, that the application should be refused, upon the authority of *The Talca*, 5 P.D. 169; distinguishing *The Vindobala*, 13 P. D. 42; and that the plaintiff appearing on the registry to be the owner of shares in his name, the Court would not consider in what character he held them.

A. O. Earle, Q.C., and *A. H. Hanington*, Q.C., for the application. *A. A. Stockton*, Q.C., and *C. A. Palmer*, Q.C., contra.

ST. JOHN COUNTY COURT.

Forbes, J.] R. *v.* C. W. BRENNAN. [Dec. 10, 1887.

C. T. Act, c. 106, R. S. Can.—Sale on board steamer—Sale by agent.

The defendant is the captain and part owner of the steamer "May Queen" plying on the river St. John between the cities of St. John and Fredericton. By an agreement between the owners of the steamer and one George Brennan the latter had the right to supply and sell meals and refreshments to passengers at his own profit in consideration of discharging the duties of steward and providing the necessary help therefor. He was also paid a salary by the owner of the steamer to assist in collecting passenger fares. The Canada Temperance Act, c. 106, R.S.C., is in force in the County of Queen. While the steamer was lying at Chipman, in that county, George Brennan sold liquors on board the steamer, and an information was laid against the defendant under the above Act. By s. 100 of the Act "Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly on any pretence or by any device, sells or barters, or in consideration, etc. 2 Everyone who, in the employment or in the premises of another, so exposes or keeps for sale, or sells, or barters, or gives in violation of the second part of this Act, any intoxicating liquor, is equally guilty with the principal," etc. On an appeal from a conviction of the defendant:

Held, that the conviction should be quashed.

F. A. McCully, for the prosecution. *J. R. Dunn*, for defendant.

Province of Prince Edward Island.

SUPREME COURT.

Full Court.] EX PARTE MORRIS. [Dec. 13, 1897.

Canada Temperance Act—Certiorari—Transfer of liquor in bond.

Application for certiorari to quash a conviction under the C. T. Act by the stipendary magistrate of the city of Charlottetown.

The applicant Morris had certain liquor in the bonded warehouse with the duty unpaid. While the goods in question were in bond he transferred them to one C., who paid the duty thereon and removed them. Under these circumstances the magistrate fined Morris for an infraction of the C. T. Act.

Held (HODGSON, J., dissenting), that the conviction was right, there having been a sale when the said Act was in force.

Per HODGSON, J., that the conviction was wrong, and should be quashed. That the C. T. Act does not, nor ever was intended to apply to mercantile transactions such as this. That liquors in bond may be, and often are, retransferred out of the country, and that the transfer of bonded goods create legal obligations between the transferee and the sovereign, incompatible with the commission of a crime, which, under the C. T. Act, a sale of liquor is.

Stewart, Q.C., for rule. *Morson*, Q.C., contra.

Full Court.] YOUNG *v.* MCISAAC. [Dec. 13, 1897.

Property in seaweed on foreshore—Rights of riparian owner.

This important case involved the question of the right to take seaweed from the seashore. At the trial exceptions were taken to the judge's rulings. On motion to set aside the verdict the following propositions of law were unanimously approved of by the court.

1. A proprietor whose boundary towards the sea is the bank or shore of a river or body of water, that boundary is high water mark, meaning by that ordinary or neap tides which happen between the full of the moon twice in twenty-four hours.

2. That seaweed, or any increment of the sea thrown upon, or up to, such land, leaving an increase arising by slow degrees, is deemed by the common law to belong to him as the owner of the soil, and that its protection to the bank forms a reasonable compensation to him for the gradual encroachment of the sea.

3. That the riparian owner, in common with all Her Majesty's subjects, has a right to take what seaweed he can, when it is floating, by a right as undoubted as that to catch fish when swimming in the sea, quite irrespective of the person in whom the foreshore is vested.

4. That if the foreshore has been granted by the crown, the grantee alone by virtue of that grant has the sole right to the seaweed stranded by the ebbing tide.

5. That if the foreshore is ungranted the crown alone has the right to the stranded seaweed, and no one has the right to take it, but if anyone gathers it no person can take it from him unless he can show a better right than his, i.e., nobody but the crown or its grantee.

Peters, Q.C., Attorney-General, *McLean*, Q.C., and *Matheson*, for plaintiff. *M. A. McLeod*, Q.C., and *Stewart*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Taylor, C.J.] [Nov. 27, 1897.

GRAHAM *v.* BRITISH CANADIAN LOAN & INVESTMENT CO.

Principal and agent—Constructive notice—Fraud—Ratification—Acquiescence—Executors—Lien for taxes paid.

This was an action commenced on the Equity side of the Court before the coming in force of the Queen's Bench Act, 1895, to have three mortgages held by the defendant company declared fraudulent and void as against the plaintiffs, and a cloud upon the title to certain lands left by the will of Margaret Logan to the mother of the plaintiffs as executrix in trust for their use with authority to exercise her discretion in the management af the property, and to sell and dispose of the same in any way she might think proper for the benefit of the plaintiffs, but without any power to mortgage the lands.

The executrix, wishing to raise some money on the security of the land, applied to the agent of the defendant company in Winnipeg for a loan on mortgage of the property, and with his knowledge it was conveyed to Miss MacDonald by deed dated the 14th March. 1881. A mortgage was then taken by the company for $2,000 the 16th March, 1881, signed by Miss MacDonald, but the evidence showed that the agent of the company was well aware that there was no real sale to Miss MacDonald, and that no consideration had passed for the deed, and that the executrix and the plaintiffs remained in possession of the property, although it did not appear that the scheme adopted had been suggested by the agent. The evidence also, in the opinion of His Lordship, showed that the solicitor of the company must have known the above facts in connection with the loan, or would have ascertained them if he had made the proper inquiries.

The property was reconveyed by Miss MacDonald to the executrix by deed dated 17th March, 1881, for an expressed consideration of $1,000, and on the 18th November, 1881, a further loan was made on the mortgage of the executrix herself for $2,000, and on the 8th November, 1884, a third mortgage was executed to secure a further sum of $1,200. It was shown that the agent of the company was authorized to make loans and put them through subject to the approval of a local board as to value, and to the report of the solicitor on the title. The application for the first loan showed that the value of the property was at least $7,000 at a forced sale, whilst the consideration stated in the deed to Miss MacDonald was $5,000. The deed and mortgage bore evidence of having been executed about the same time and were registered at the same time, and the solicitor made no inquiry as to the possession.

Held, that the solicitor ought to have known that a breach of trust had been committed, that the agent's knowledge of the fraud committed must be imputed to his principals, and that the circumstances brought the case within the principle laid down in Evans on Principal and Agent, page 516, as follows. "A principal is liable to third parties for whatever the agent does or says, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he were in the place of the agent."

Held, also, following *Staintor* v. *Carron Co.*, 18 Beav. 146, and *Yeatman* v. *Yeatman*, 7 Ch. D. 210, that the plaintiffs had a right to bring the action in their own names as the executrix could not sue; and that the Statute of Limitations afforded no defence in any way, as the company never had, but the plaintiffs had always been in possession.

Some evidence was given to show that one of the plaintiffs, being seventeen years of age at the time, had been aware of the making of the loans, and had been present at some of the meetings and interviews between the parties, but the Chief Justice considered that there was nothing to show that she should be estopped in any way by conduct or acquiescence from setting up the present claim. He also held that there was nothing to show that the money borrowed had been used in the maintenance and education of the plaintiffs in any way. The company claimed a lien on the land for money for insurance premiums and taxes, and to redeem the land from a tax sale.

Held, that they were entitled to such lien in respect of the taxes, but not for the insurance premiums.

Judgment declaring the mortgages void as against the plaintiffs, and a cloud upon the title of their lands, but providing for a lien in favor of defendants for moneys paid for taxes, and tax sale redemption.

Ewart, Q.C., and *Andrews*, for plaintiffs. *Mulock*, Q.C., for defendants.

Full Court.] BERTRAND *v.* CANADIAN RUBBER COMPANY. [Dec. 6, 1897.

Fraudulent preference—Insolvent circumstances—Intent to prefer.

Judgment of KILLAM, J., noted 33 C.L.J. 550, affirmed with costs.

Tupper, Q.C., and *Phippen*, for plaintiff. *Hough*, Q.C., and *Richards*, for defendant.

Bain, J.] WILTON *v.* MURRAY. [Dec. 6, 1897.

Watercourse—Drainage—Right to obstruct flow of water.

The plaintiff's claim was that a watercourse ran through her land into and across the defendant's land, and thence into a gully or slough on the defendant's land, which finally emptied into Long Lake; and that for some years past the defendant had obstructed the flow of water in this watercourse by building a dyke or embankment across it on his own land, the effect of which had been to throw the water back upon and overflow the plaintiff's land. And the prayer was that the defendant might be ordered to remove the obstruction this made, and be restrained from continuing it.

Most of the land in the neighborhood is low and flat, and the natural drainage of the plaintiff's land, and of several of the farms to the south and west, is by the alleged watercourse above referred to. The easterly part of the plaintiff's quarter section thus spoken of is high land, but along the westerly part of it there is what is called a depression extending through the quarter section from south to north, crossing into defendant's land and continuing through it till it reaches the slough or gully above mentioned. The fall in the level of this depression from the south line of the plaintiff's land to its lowest level, where it crosses into the defendant's land, is very slight, and at that point the depression has a width of about 300 feet. There is no continuous flow of water through it, but every spring the rain and melted snow from the lands south and west of the plaintiff's land, and from the higher parts of her own land flow or drain into it, and covering it to a depth of six inches or more, according to the season, gradually pass off, in the absence of obstruction, across the defendant's land into the slough. In the high water there is a perceptible northerly current for a few days, and the height of the water on the slope of the depression, and the general course of its flow are defined by the rubbish deposited along the edge of the current, but the position of this line of rubbish varies from year to year, according to the height of the water. Apart from this there was no evidence of the existence of any banks or edges of a channel through which the water flows, and in some years the plaintiff has cultivated portions of this depression right up to her western line.

Held, that there was no watercourse which plaintiff had any right to have kept free and clear of obstruction for the benefit of her land, and that her action must be dismissed with costs. A watercourse has been defined to consist of bed, banks and water, and while the flow of the water need not be continuous or constant the bed and bank must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground, and according to the evidence such do not exist in this case.

Full Court.] RE TAYLOR AND CITY OF WINNIPEG. [Dec. 11, 1897.

Municipality—By-laws—Dairy inspection—Ultra vires.

Appeal from judgment of Dubuc, J., noted 33 C.L.J. 580, dismissed with costs except as to paragraphs 17 and 22 of the by-law in question.

Held, that a vendor of milk could not be required to state where he obtained the milk he has sold or is about to deliver as required by pp. 17, because his answer might subject him to the cancellation of his license, and the other penalties provided for by the 24th and 28th paragraphs of the by-law, or to permit a sample or samples of any milk being delivered or intended to be delivered to any customer in the city to be taken for examination as required by the 22nd par. under the penalties provided for in the by-law in case of refusal, because no provision was made for compensation for what might thus be taken; and that the by-law in those respects was ultra vires.

Mathers, for applicant. *I. Campbell*, Q.C., for city of Winnipeg.

Full Court.] FOSTER *v.* LANSDOWNE. [Dec. 11, 1897.

Municipality—Negligence in exercising statutory powers- Right of action—Arbitration—Pleading.

This was an appeal from the judgment of Dubuc, J., noted 33 C.L.J. 579, overruling a demurrer to the statement of claim herein, which alleged that the defendants by constructing in a negligent and improper manner a ditch for drainage purposes had caused the plaintiff's land to be overflowed with water whereby he had suffered damages, but did not allege that any by-law had been passed by the council of the municipality authorizing the construction of such drain.

The Municipal Act apparently gives no authority to the council to execute any such drainage works without first passing a by-law providing for it.

Held, that it is doubtful whether s. 665 of the Municipal Act does not confine the remedy to arbitration, and prevent a party from resorting to an action in case of damage resulting from the exercise of the statutory powers of the municipality in the construction of drainage works whether negligence be alleged or not, but that it was unnecessary to decide that question, as the statement of claim in this case did not show that there had been any by-law to authorize the work in question, and the Court could not assume that there

had been, and for all that appeared the work may have been done without statutory authority, and that the statement of claim was not, therefore demurrable. Appeal dismissed with costs.

Metcalf and *Sharpe*, for plaintiff. *Attorney-General*, and *James*, for defendant.

Full Court.] ADAMS *v.* HOCKIN. [Dec. 13, 1897.

Real property Act—Caveat—Description of land—Statement of interest claimed—Address of petitioner—New evidence on appeal—Rule 476, Q.B. Act, 1895.

This was an appeal from the decision of Taylor, C J., noted 33 C.L.J. 701, dismissing the petition of the caveator with costs.

Held, reversing this decision, that the description there set out was not necessarily indefinite and uncertain, unless there was more than one plan of Oak Lake, when an ambiguity might arise, that, if it followed the description given in the application of the caveatee, it would, according to the form in schedule O, be sufficient; and that both the caveat and petition sufficiently showed what estate, interest or charge the caveator claimed; also that there was no rule of Court requiring the address or description of the petitioner to be stated in his petition, and that the order of the referee should be restored with costs to petittoner of both appeals.

The respondent applied under Rule 476 of the Queen's Bench Act, 1895, for permission to put in evidence to show that the description in the caveat differed materially from that in the application.

Held, that upon payment of the costs of both appeals, such evidence should be received. Order that if respondent should pay such costs within five days after taxation, the order for an issue made by the referee should be rescinded and the matter referred back to him with leave to adduce the evidence mentioned, but if not so paid the order of the referee should stand confirmed with costs of both appeals to be paid by the caveatee.

Clark, for caveator. *Patterson*, for caveatee.

Bain, J.] [Dec. 22, 1897.

CARRUTHERS *v.* HAMILTON PROVIDENT & LOAN SOCIETY.

Mortgagor and mortgagee—Negligence in exercising power of sale.

The plaintiff claimed damages for the sale of his farm by defendants under powers of sale contained in two mortgages, interest being in arrear. The property was near Portage la Prairie, and in the centre of a district of good farming land. The evidence showed, in the opinion of the trial Judge, that the property was worth $3,700, and would have brought that amount at an auction sale if properly advertised. Defendants, however, sold it for $2,800, subject to unpaid taxes.

Held, that defendants were liable for the difference between the two amounts, because they had so negligently and carelessly conducted the sale proceedings that the property was sacrificed.

The objections to the advertisement and sale were as follows :

1. There was no advertisement in any local newspaper; but only in a newspaper published in the town of Brandon, between seventy and eighty miles distant, and which was not shown to have any circulation in the neighborhood of Portage la Prairie.

2. The advertisement itself made no mention of the fact that the farm was an improved one, with valuable buildings on it, and 100 acres ready for next year's crop, but simply described the property as the N. E. ½ of section 22, tp. 12, range 7, west; and it also contained a description of other properties to be offered for sale at the same time. As to another of these, it stated that "the vendors are informed that on parcel (1) there is a two-story dwelling house," thus suggesting the inference that the plaintiff's land was unimproved.

3. The sale took place at Brandon instead of Portage la Prairie.

Aldrich v. *Canada Permanent*, 24 A. R. 193, followed.

C. H. Campbell, Q.C., for plaintiff. *A. D. Cameron*, for defendant.

MASSEY-HARRIS COMPANY *v.* WARENER.

Exemptions—R.S.M., c. 80, s. 12—Queen's Bench Act, 1895, Rules 803-806—Evidence—Affidavit.

This was an appeal from the decison of BAIN, J., noted 33 C.L.J. 777, who held that where the judgment debtor had conveyed his farm to his wife for the purpose of defeating and delaying creditors, he could not claim the benefit of the Exemption Act, as against the plaintiffs' registered judgment, although he was living on the land.

The judgment debtor had been served with a notice of motion under the Queen's Bench Act, 1895, Rule 803, calling upon him to show cause why the land should not be sold, and took the objection which he had also taken before the Referee and BAIN, J., that the evidence produced by the plaintiffs was not sufficient to prove the registration of the judgment relied on. This evidence consisted of an affidavit sworn by a clerk in the plaintiffs' employment, in which he stated that the plaintiffs had recovered a judgment against the defendant in the County Court of Belmont, and caused a certificate of said judgment in the proper form required by the statute to be issued, and that the same was duly registered in the land titles office for the district of Morden, where the lands in question are situated, but did not show his means of knowledge of such facts. Besides this affidavit, a post card was filed, having a memorandum on it to the effect that a certificate of judgment for $110.20 at the suit of the *Massey-Harris Co.* v. *Robert Warener* was received and registered 24th July, 1896, but not stating where the same was registered. The post card was not signed otherwise then by the stamping of the words "District Registrar" at the foot, and at the top were written the words, "L. T. O. Morden."

Held, that such evidence was not sufficient to prove the registration of the

judgment relied on, that a certified copy of the certificate should have been produced, and that the appeal should be allowed with costs, without prejudice to another application or any other proceedings.

The Court expressed no opinion upon the question of the defendant's right to claim exemption for the land.

Culver, Q.C., for plaintiffs. *Metcalfe and Sharpe*, for defendant.

Full Court.] INCH *v.* SIMON. Dec. 23, 1897.

Bills of Sale Act—Chattel mortgage—Affidavit of execution sworn before the mortgagee.

Held, that under the Bills of Sale Act, R.S.M., c. 10, it is not a fatal objection to a chattel mortgage that the affidavit of the witness as to its execution by the mortgagor has been taken before the mortgagee himself, he being a commissioner for taking affidavits in the Province, as there is nothing in the Act to prevent such a course being adopted.

Pitblado, for plaintiff. *Bradshaw*, for defendant.

Province of British Columbia.

SUPREME COURT.

Bole, Loc. J.] MEISTER *v.* PHILP. [Dec. 10, 1897.

Commission to take evidence out of the jurisdiction.

Application was made in this case on behalf of the plaintiff for a commission to examine him at Seattle, and the defendant resisted the application on the ground, inter alia, that he desired to have the plaintiff cross-examined before the court.

Held, following *Castelli* v. *Groome*, 21 L.J. Q.B. 309, that it lies upon the person applying to the court to show that it would be conducive to the due administration of justice that the commission should issue. It is not enough to show that the plaintiff or defendant lives out of the jurisdiction of the court. It would lead to most vexatious consequences, if constant recourse could be had to this power, and it would be so in all cases where parties wish to avoid the process of examination in court. *Berdman* v. *Greenwood*, 20 C.D. 764; *Ross* v. *Woodford* (1894), 1 Chy. 42; *New* v. *Burns*, 64 L.J. Q.B. 104, *Ehrmaun* v. *Ehrmaun*, 65 L.J. Chy. 747.

Application refused

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

Rouleau, J.] MONGENAIS *v.* HENDERSON. [Oct. 28, 1897.

Costs—Taxation—Counsel fees—Practice in N.W.T. as to setting cause down for trial differs from English practice.

Appeal by the defendant, Henderson, from the Clerk of the Court to the Judge against the disallowance by the Clerk, on taxation of costs, of fees for brief, including counsel fee, advising on evidence and fee with brief at trial.

On June 23, plaintiffs took out an order to "set this cause down for trial at the next sittings of this Honorable Court, commencing on Tuesday the 2nd day of November, 1897 . . . . and that advocates for the plaintiffs do give to the advocates for the defendants eight days' notice of such trial, after which the cause may come on to be heard."

On October 22nd the plaintiffs with the consent of the defendant Henderson procured an order to discontinue as against him "on payment of his costs forthwith after taxation." On the taxation of costs all items respecting brief, counsel fee, advising on evidence and counsel fee with brief at trial were disallowed by the Clerk, on the ground that the notice of trial provided for in the order setting down had not been given.

On appeal it was contended for plaintiffs that cause had not been set down, and that defendant was not entitled to costs of brief until after notice of trial given: *Freeman* v. *Springham*, 32 L.J. C.P. 249; *Cooper* v *Boles*, 5 H. & N. 188.

For the defendant it was contended that the practice in the North-West Territories in this matter differed from that in England. The order setting down virtually covered the English notice of trial and order entering.

ROULEAU, J.: The English practice is set out in E.M.R. 435, 436, 439 and 444. Our procedure is laid down in J. O., section 154, which provides that "After the close of the proceedings the plaintiff may at any time, on notice to the defendant, apply to the Judge for and obtain an order setting down the cause for trial . . . at such time and place as the Judge shall direct. . . . But if such application be not made within three months after the close of the pleadings, the defendant on notice may apply for and obtain an order to set the cause down for trial."

It is quite clear that the practice in the Territories with regard to setting a cause down for trial differs from the practice in England in that behalf. With us the order setting down takes the place of the English notice of trial and order entering. No importance is to be attached to the fact that in the order setting down, provision is frequently made for notice of trial before hearing. This notice is a mere matter of courtesy, and the order is not

impaired if no clause with regard to it be inserted. The date of the opening of court is fixed, and litigants must be ready for trial on that day. Defendant is therefore entitled to tax items claimed, except fee with brief at trial.

P. McCarthy, Q.C., for plaintiffs. *James Short*, for defendant Henderson.

Scott, J., Rouleau, J.] REGINA *v.* MONAGHAN. [Dec. 7, 1897.

Indian Act—Certiorari—Stated case—Res judicata.

The defendant had been charged on an information and convicted under R.S.C. c. 43, s. 94, "for that he did sell to an Indian intoxicating liquor," etc. At the close of the evidence, defendant's counsel objected that two offences were charged. After consideration the magistrates drew up the conviction as above. The defendant thereupon applied for, and obtained a stated case, under s. 900 of the Criminal Code, which was heard before Mr. Justice Scott, who held that to give and sell were not two offences, and affirmed the conviction. The magistrates having transmitted the conviction and proceedings to the Clerk of the Court at Macleod, under s. 801 of the Crim. Code, the defendant applied for and obtained from a single Judge a rule nisi returnable before the full Court, sitting en banc at Regina, asking that the conviction be quashed on the same grounds as were taken on the stated case, and a direction was given to the Clerk at Macleod to transmit the conviction, etc., to the Registrar of the Court at Regina, which he did.

On the return of the rule nisi at the sittings of the full Court at Regina on Dec. 6, 1897, counsel for the private prosecutor and for the magistrates took the preliminary objection :

1. That the conviction, etc., were not regularly before the Court, not having been brought there by a writ of certiorari, and the same could not be examined into, or dealt with.

2. That a single judge under s. 900, sub-sec. 9, being vested with all the authority and jurisdiction of the Court, and having sustained the conviction, from which decision there was no appeal, the question was res judicata, and the conviction could not now be quashed on the same grounds as were taken on the stated case.

Held: 1. By SCOTT and ROULEAU, JJ., That the conviction, etc., were regularly before the court, and could be dealt with, and that a writ of certiorari was not necessary, following *Reg.* v. *Wehlan*, 45 U. C. R., 396.

2. By RICHARDSON and WETMORE, JJ., That the conviction, etc., were not regularly before the court, and that a writ of certiorari to bring them before the court was necessary, following *Reg.* v. *McAllan*, 45 U. C. R., p. 402, and distinguishing *Reg.* v. *Wehlan*.

3. By the full Court, That the grounds now taken on which to quash being the same as those taken and disposed of by a single Judge on the stated case, the matter was res judicata.

Rule nisi dismissed with costs.

Costigan, Q.C., for defendant. *Muir*, Q.C., for the magistrates and for the prosecutor.

Book Reviews.

American Electrical Cases, Vol. VI. 1895-1897. Albany: Matthew Bender. Toronto: Canada Law Journal Co.

This latest volume of the above series gives a verbatim report of the important decisions in the State and Federal Courts of the United States in the past two years on subjects relating to the telegraph, the telephone, electric light and power, electric railway and all other practical uses of electricity. Valuable annotations edited by N. W. Morrill are added as notes to the principal cases, and in them the authorities are carefully summed up. The notes to the report of one of these cases are a valuable dissertation on the ever live subject of contributory negligence in electric street railway cases.

The Law of Mines and Mining. By D. M. BANINGER, A.M., LL.B., and J. S. ADAMS, A.B., LL.B., of the Philadelphia Bar. 1897. Boston: Little, Brown & Co.; Toronto: Canada Law Journal Co.

This very comprehensive work appears opportunely at a time when mining rights and interests are attracting much attention, both in Canada and the United States. It is not confined to the law applicable to any particular portion of the country, or to mines of any particular kind. Its aim is to give a complete and accurate statement of the rules of law governing the rights and duties of miners and mine owners, with citations of the authorities in support of the text. A most important feature is the introduction of an illustrated chapter, dealing with the geology and physical attributes of the subject matter in a manner by which the reader is readily familiarized with the practical and technical knowledge so necessary for the proper consideration of the legal questions.

The Shareholders and Directors Manual, by J. D. WARDE, of the Provincial Secretary's Department, Toronto; Fifth edition; Canada Railway News Company, Limited, 1898.

The fifth edition of this very useful compendium, contains the laws relating to joint stock companies, with pratical information as to the steps to be taken, and the proofs to be furnished on applying for charters of incorporation not only under the Acts of the Dominion of Canada, but of various provinces, relating to the incorporation of joint stock companies by letters patent, together with much useful information respecting the organization and management of such companies, with suitable forms. This edition, which has been revised and enlarged, does not assume to be so much a disquisition upon the law of joint stock companies as a sketch of the general principles, with only a limited reference to case law, with practical suggestions of a useful character, which will made it valuable to the numerous class of lawyers and laymen who are now interested in this new development of the nineteenth century. The information contained would be more useful if the index had been more complete. The value of many works from a practical standpoint is marred by want of attention to this most essential particular.

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As our Ontario readers are probably aware, the Revised Statutes came into force from and after the 31st December last. They have not, however, as is also known, been distributed, and are not obtainable, though they can be seen in some favoured localities. It is perplexing and annoying not to be able to refer to laws that are in force, and which have to be acted and advised upon. The reason of the difficulty is said to be that the index is not ready. As the index of our last volume, which is a vastly more troublesome matter to make than an index to these statutes, was in the printer's hands before the end of the year, it clearly would not have been an impossibility to have had the latter ready at least within the same period. We presume it will be very elaborate. The statutes have been, speaking generally, so badly and defectively indexed up to the present time that we should be glad to be able to commend the labours of the person, whoever he may be, who has in charge the work under consideration, when the happy moment of its completion shall have arrived.

Unprofessional agents have, we presume, come to stay, and their existence cannot be ignored, though it may be deplored. Like mosquitos they probably have some use, though it is rather difficult to find out what it is. They have methods, some known to the law, some unknown, and some contrary thereto. They are not as often caught at illegal practices as should be. It is, therefore, refreshing to have an instance to record of their falling into the clutches of the law. A case occurred recently which may be noted: A man who calls himself the general manager of a collecting agency

in a city of the Dominion, undertook to collect a debt of some $30 from a verdant youth, by going to his premises, representing himself as a bailiff, and seizing and removing a quantity of goods from his premises, which he said he would hold until the debt was paid. The debtor being overpowered by the terror of the so called officer submitted to be robbed, but on mentioning the matter to a friend he was induced to indict the debt collector for robbery with menaces under s. 404 of the Criminal Code. The case was clearly proved, but the magistrate mercifully allowed the prisoner to go on suspended sentence, several respectable witnesses having spoken as to his previous good character. It is well to be merciful, though, perhaps, it was scarcely wise to let him off, as an example would have had a healthy effect.

The record of crime in the Dominion as set forth in the Government report for the year ending September, 1896, indicates an encouraging condition of things, the number of convictions being reduced from 5,474 in 1895 to 5,204 in 1896. Comparisons are odious, and statistics are not in all respects reliable, but one is compelled when speaking on this subject to refer to the remarkable contrast between the statistics above referred to and those of the country to the south of us. The *North American Review* gives some startling figures in connection with this subject, showing an enormous increase of crime in the United States as a whole, which, however, does not obtain in the best of the New England States, where the statistics are exceedingly satisfactory. The increase of crime is due largely to the large influx of population from Europe, which at one time was much sought after, but which has proved not to be an unmixed good.

The National Prison Association has recently referred to the matter at their annual meeting in Austin, Texas. The report of the Committee on Criminal Law Reform states that the progress of crime was "absolutely frightful," and recommends some changes in the handling of criminals as follows:

"Greater security of punishment; doing away with all technicalities in trials; abolishment of juries; making convictions more summary and trial more speedy; depriving defendants of the right to appeal to a higher court; offering rewards for the discovery and conviction of criminals; sterilization of defectives, both moral and physical; abolishment of poverty; removing or restricting the power to pardon; prohibiting the use of intoxicating liquors; reconstruction of the ethical code of lawyers; curing inherent defects in the law, as distinguished from its enforcement; developing a scientific motherhood; state regulation of marriage; restricting immigration; popular education and colonization of criminals; the reformation of criminals by the abolition of the definite sentence."

Some of these suggestions are even more remarkable than the report itself, and the fact that they are even hinted at as desirable is a sufficient indication of the difficulties to be grappled with. A moment's reflection on these suggestions shows that they hint broadly at a state of things appalling to contemplate. We trust this arraignment of governors, judges, lawyers, juries, and the administration of justice generally is overdrawn. The committee admits that some of these suggestions are practically impossible, but thinks that by following them as closely as possible the morals of the country would be greatly improved, and crime correspondingly decreased.

WILL AN ACTION OF NEGLIGENCE LIE FOR DECEIT?

We publish in another place a letter from Mr. J. S. Ewart, Q.C., of Winnipeg, referring to our criticism on an article written by him which appeared in the *Canadian Law Times*.

The first thought which a perusal of this letter suggests is that, even if the writer is correct in his assertion that our criticism of his article was "in no sense an answer to his article," he has himself made up most handsomely by the candid declaration with which he sets out for any shortcomings which may justly be laid at our door; a writer who, in a treatise which is presumably compiled for the use of prac-

titioners, admits that "it is not the law" that an action of negligence will lie for deceit is virtually in the position of a barrister who throws up his brief and consents that judgment be entered against his client. It seems to us that a gentleman who, in an ordinary legal treatise, undertakes to show not merely that there have been erroneous applications of accepted principles in particular cases, but that the accepted principles themselves are erroneous, seems to be singularly deficient in a saving sense of humour. All practicing lawyers desire to know what the law is. Comparatively few care to know what any individual author thinks it ought to be. The inference is obvious. Any writer who is ambitious to appear in the role of a legal reformer should carefully separate that part of his book which professes to state the effect of "the authorities" from the disquisitions in which he roams into the unfamiliar, though perhaps more attractive, regions of the ideal. In the present instance we venture to think that it would be well to adopt an arrangement which would do away with that unpleasant feeling of insecurity which must inevitably result from a doubt whether the reader has before him the ex cathedrà utterances of those professors of the law who are termed judges, or the theoretic lucubrations of the author himself.

But we do not wish to insist too strongly upon the technical advantage which our opponent has given us by signing a confession of judgment in our favour. The question raised deserved to be argued briefly upon the merits also.

In the first place we should like Mr. Ewart to explain upon what theory he deems himself entitled to assert that the citations in our former criticism prove that "we are both right." In our innocence we had imagined that the two dicta quoted would serve as a most conclusive vindication of our own view. One who undertakes to crush an adversary by the extremely agreeable dialectic manœuvre of turning his own cases against him should at least extend to him the courtesy of indicating in what respect he has mistaken the meaning of those cases. But perhaps this assertion is intended to be a sort of proleptic condensation of the substance of the latter

part of his letter. At all events we shall treat it as such provisionally, and proceed to the assault of the citadel of his position.

"Why," it is asked, "should we have a class of actions based upon a breach of duty, and decree that deceit, the gist of which is breach of duty, should be excluded from it?" Were it not for the fact that Mr. Ewart supposes this question to be one which will cause us serious embarrassment, we should have thought it "as plain as way to parish church," that it is wholly irrelevant. There is no warrant whatever for the assumption which underlies it, for "the authorities" do not exclude deceit from the class of actions referred to. The essential point of difference between our author and those obstinate people who will persist in standing "*super antiquas vias*" is not at all what is here insinuated, but simply this—that the former starts with the hypothesis that negligence is a generic term, covering all breaches of duty, while from the standpoint of the latter there are several distinct kinds of duties, among which are included both that duty the breach of which constitutes negligence, and that duty the breach of which constitutes deceit.

The dialectic situation, therefore, seems to be truly hopeless. If, on the one hand, Mr. Ewart is incapable of seeing, or declines to admit, that the real issue presented is that which we have here set forth, it is impossible to meet him in argument, for we shall have reached that deadlock which results when antagonists are unable to agree upon any starting point. If, on the other hand, he does admit that we have fairly stated the issue between us, we confess that our case has no support except what it obtains from "the authorities," and he has apparently taken up the position that these have no final jurisdiction in the premises. Will our correspondent show us some way out of this dilemma?

The discussion has now once more reached a point at which we should be warranted in cutting it short, pending a more definite restatement of Mr. Ewart's case—an amendment of his pleadings, so to speak—which will furnish some common ground upon which the argument can be continued.

But the present article would scarcely be complete if we did not express our opinion as to the source of what we fear those who, like ourselves, feel constrained to defer to the "authorities" will persist in regarding as an error on Mr. Ewart's part. We shall thus, perhaps, facilitate the attainment of that "consummation devoutly to be wished"—a clearer understanding of the actual nature of the issue between us.

According to one very eminent "authority" whose definition has constantly been quoted with approval by other scarcely less eminent "authorities," negligence is simply "the absence of care according to the circumstances"(*a*), and the same fountains of the law, as it is usually administered, have also supplied us with the doctrine that the only standard for ascertaining what constitutes the "absence of care" is the conduct which a man of ordinary sense, knowledge and experience is accustomed to show in his own affairs (*b*). This is the only instance in which jurisprudence frankly acknowledges its inability to furnish any practical test for determining the quality of acts except the behaviour of the typical citizen who is supposed to perform all his social duties faithfully. There is no need to take the opinion of a jury upon the question whether it is tortious to utter or print a defamatory statement, to knock a man down with a bludgeon, or trample down his flower beds. All that has to be decided in such cases is whether the evidence shows that the defendant committed the acts which are alleged to render him guilty of slander, battery, or trespass. That they are an infringement of legal rights is assumed. And the same principle obviously holds good in regard to obligations arising out of contract.

But it is clear that acts of the class just referred to may also be considered as tortious, for the reason that they are such that the typical citizen who fulfils his various duties to the other members of the community in which he lives, will refrain from committing them. Theoretically, therefore, the conduct of this typical citizen may be appropriately used as a test

(*a*) Willes, J., in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679 (p. 688).
(*b*) See Pollock on Torts (3 ed.) p. 24: Beven Negl. pp. 16, 17.

by which to determine the quality of *all* acts which are complained of as injurious. The classification of torts indicated by this consideration is obvious. All breaches of duty are not examples of negligence, the simple reason being that the area covered by the conception expressed by term "negligence" is co-extensive with that defined by acts which the typical citizen will not do in his special character of a man of average prudence, skill, diligence, etc., while the area covered by the conceptions expressed by the words which denominate other kinds of tortious conduct is co-extensive with that defined by acts which such typical citizen would not do in his special character of a man who deals uprightly with his neighbours and abstains from damaging them in person or property.

This form of statement not only enables us to see at a glance the fallacy involved in Mr. Ewart's theory, but also, if we are not much mistaken, indicates the origin of that fallacy. The character of the typical citizen is a composite one. He is prudent, skilful, and diligent, but he is also actuated by motives which induce him to avoid committing such wilful acts as those we have already referred to by way of illustration, as well as from many others. Mr. Ewart, however, draws no distinction between what such a citizen *will* do, as a man in the exercise of prudence, skill and diligence, and what he will do as a man who will not defame his neighbour, or inflict damage upon his person or his property. Logically such a confusion between the various moral qualities is wholly inexcusable, and the sole grain of truth which underlies it is that the special quality which saves a man from being negligent will be apt to save him from infringing legal rights, for the incidental reason that it is commonly inexpedient to commit such infractions (*a*). But this fact by no means warrants the conclusion that it is in his character as a careful man that the careful man is honest, just and the like. Such a doctrine

(a) The "authorities" have fully recognized that there is this point of contact between negligence and fraud in the line of cases which hold that gross negligence may be evidence of "*mala fides*" and involve the same civil consequences—a doctrine also embodied in several aphorisms of the Roman Law. See II Beven on Negl., pp. 1624, *et seq.* We wonder, by the way, that Mr. Ewart did not strengthen his position by referring to this theory. It is the only instance, so far as we know, in which the "authorities" can be said, to lend any countenance to his peculiar ideas.

savours of the infancy of metaphysics and jurisprudence, and is entirely out of harmony with the tendencies of that evolutionary process which, by the introduction of more and more minute differentiations, is constantly imparting increased clearness and definiteness to the fundamental conceptions of every science. In other words we are invited to adopt a theory which implies retrogression not advance. This fact alone is an insuperable obstacle to its acceptance.

After having made these rather lengthy comments upon what we regard as the essential and fundamental error of our antagonist, it would, we think, be trying the patience of our readers too far if we undertook to deal with all the minor details of his letter. One or two of his points, however, seem to call for a summary notice.

We do not feel at all dismayed or disconcerted by the question which Mr. Ewart triumphantly puts in one of the concluding paragraph of this communication. "When," he asks, "was a plaintiff non-suited in negligence because the defendant swore that the act complained of was accompanied by design and purpose?" Never, we sincerely hope, for the veriest ignoramus of a backwoods Dogberry would scarcely commit such a solecism in procedure as to deny the plaintiff the right of having his case tried on the theory on which his declaration is framed. Here again we seem to trace the effects of that lack of humour which we have already deplored in our adversary. Such an extraordinary potency we surely never attributed to an oath of the defendant's by any pleader, dead or alive. And even if this objection be waived it is certainly not easy to see what material advantage the defendant would gain by deliberately alleging that his act was wilful instead of being merely careless. Would Mr. Ewart expect that a client of his would be mulcted in smaller damages if the jury adopted the view suggested by such an allegation? We strongly advise him not to trifle with the common sense of the average panel by any such endeavour to turn the flank of his opponent.

In another place Mr. Ewart, with a condescension for which, under the circumstances, we cannot be too grateful,

observes that he agrees with Brett, M.R., in the definition of negligence quoted in our former criticism, provided that by the word "care" he means "care for the rights of others." If the quotation had been read a little more attentively, he might have avoided the very mild inconsistency of deferring to the "authorities" even to this extremely limited extent; for he would have noticed that the learned judge twice uses the word "skill," as one which belongs to the same circle of qualities as "care." Clearly, therefore, the condition upon which Mr. Ewart agrees in this instance to accept a judicial exposition of the law cannot be fulfilled. The use of the term "skill" as one implied in or analogous to "care" shows that the conception present to the mind of the Master of the Rolls was one very different from that which is conveyed by the term "regard." The alternative expression clearly refers us to the principle, that a man may subject himself to the penalties of negligence by undertaking a duty without having the skill necessary for its proper performance; and this liability is wholly independent of the question whether he has been heedful attentive to avoid injuring the person and property of others during such performance. The futility of attempting to reach firm ground in the manner suggested by Mr. Ewart will be still more strikingly apparent when it is considered that we may, consistently with the recognized signification of words, and without tautology, speak of a "wilful," as well as ot a "careless" disregard to the rights of others. This phrase, in fact, has really no juridical meaning, unless it be construed in the sense of a violation of the rights of others—a sense which is, at best, decidedly forced, and which, even if accepted, would make it nothing more than a loose and unscientific paraphrase of the familiar technical expression "tort."

But our correspondent probably will not shrink from this conclusion. It merely illustrates once more that retrogressive quality of his theories upon which we have already animadverted, and brings us back again to a realization of the utter impossibility of finding any common ground upon which we

can argue with him. Fruitful discussion is manifestly out of the question where one of the disputants starts with the assumption that the official jurists on the bench are entirely warranted in their position that the rights of litigants may be settled with greater facility by dividing torts into several classes, while the other disputant reasons from a non-official theory of his own which not only does away with all distinctions between those classes, but elevates what has always been considered as merely a species to the dignity of a genus, and makes it cover every case in which a duty is violated.

ENJOINING A BOYCOTT.

The American legal journals have been discussing at considerable length the recent judgment of the United States Circuit Court of Appeals in the case of *Hopkins* v. *The Oxley Stave Co.*, on appeal from the Circuit Court of Kansas. A report of the case will be found in the *Albany Law Journal* of Dec. 4. The application of the plaintiff company was to prevent the members of a labor organization (defendants in the Court below) from conspiring to carry out a boycott against the company, having for its purpose the compelling the latter to withdraw from use a newly invented machine for hooping barrels. The contention of the defendants was that this machine largely reduced the number of men employed in the manufacturing of barrels. The substantial question was whether the agreement entered into by the members of the defendants' association to boycott the contents of all barrels and packages made by the company which were hooped by machinery, was an agreement against which a court of equity could afford relief. The court below granted an injunction, and the defendants appealed. The contention of the appellants was that it was a lawful agreement, such as they had a right to make and carry out for the purpose of maintaining the rate of wages then paid to journeymen coopers, and that

being lawful the injury occasioned to the plaintiff company, no matter how great, was an injury against which no Court could afford redress.

The injunction was sustained by the appellate court, which held that the combination amounted to a conspiracy to wrongfully deprive the plaintiff company of its right to manage its business according to the dictates of its own judgment, and that the action of the members of the combination to prescribe the manner in which the company should do its manufacturing, and to attempt to enforce obedience to its orders by a species of intimidation no less harmful than actual violence, could not be allowed. The Court also referred to the further consideration that another result of the conspiracy would be to deprive the public at large of the benefits to be derived from a labour-saving machine of great utility.

There can scarcely be a doubt as to the soundness of this decision and it is somewhat of a surprise that there should have been a dissenting judge. This consisted largely of a vigorous indictment of trusts and all the villainies following thereon. This judge, who was apparently talking to the galleries, held that a boycott is a legal weapon if used in a peaceable, orderly manner, in which expression he was, perhaps, partly right and partly wrong, but in fact it was simply begging the question. Most certainly any view other than that expressed by the majority of the Court would result, as one of our exchanges says, in the institution and perpetuation of a system of tyranny, the evil consequences of which it would be difficult to over-estimate.

Another decision of recent date on the subject of boycotting is *Hartnett* v. *Plumbers' Supply Association*, decided by the Supreme Judicial Court of Massachusetts. In this case an attempt was made to coerce an alleged debtor into paying a disputed bill by procuring suspension of his credit among persons in the same line of business with the creditor. The Court held that the facts constituted a conspiracy to coerce persons through a species of business duress which could not be permitted. This case is reported in 47 N.E. Rep. 1,002.

A STRANGE MURDER CASE.

In the year 1815, after the fatal 15th of June, a favorite officer of the defeated Emperor, determining not to live under the rule of any other sovereign, made his way to Canada. He went into what was then the wilds of the primeval forest, now a portion of the County of Hastings in the Province of Ontario. There he married the only daughter of an Indian chief, whose tribe roamed through that region. The only daughter of that marriage married a white man by the name of Davis, and several children were the issue of this union.

One of the sons, Peter Edwin Davis, was the hero of a remarkable trial for murder which took place at Belleville before Chief Justice Armour in April, 1890. The case is somewhat remarkable, not only from the facts of the case itself, but from the callousness displayed by witnesses closely related to the accused and to the victim.

One William Emory, who had been married to Mary Martha McGarvey, was found dead in September, 1889, in a hay marsh where he had been mowing. His rifle, which he had with him, was found about six feet away from the dead body, with the muzzle driven with force into the marsh some six or eight inches. It was quite certain that his death was occasioned by a bullet from this rifle. No signs of powder were found upon his clothes. The rifle was empty. The bullet had gone quite through the body shattering the spine; and death must have been instantaneous. There was nothing to indicate suicide and it seemed a clear case of murder.

Suspicion at once fell upon Peter Edwin Davis. He was a stalwart, muscular man, over six feet in height, and straight as an Indian. Having something of the roving habits of his ancestry on the distaff side, he made his living by gathering ginseng, a plant, the root of which is esteemed in China a very valuable medicine, and which is exported in considerable quantities to that country.

After a coroner's inquest had been held, Davis and Mrs. Emory, the wife of the deceased, were arrested and were put

on their trial upon the same indictment. Mr. W. R. Riddell represented the Crown, while the prisoners were defended by R. C. Clute, Q.C., and the late S. B. Burdett, Q.C.

It was proved by the evidence of Stephen Davis, the brother of the prisoner Davis that the latter had said that he understood that Emory was going to shoot him, and that he would try and get the first ball in if he could; that shortly before the murder the prisoner asked him where Emory was, and on being told "at home," he answered with a fearful oath, "He had better be at home. I will have the blood of them that are making enemies for me."

This evidence was given with an indifference and callousness which one would not expect of any witness giving such evidence against even a stranger, but coming as it did (and apparently with perfect truthfulness) from a full brother of the prisoner, it caused a shudder to run through the court room. The brothers of the female prisoner gave evidence in much the same way. One of them swore that Davis had said that if he ran across William Emory, and Emory "mislisted" him, he would shoot him. Another of the brothers swore that he had seen the prisoners standing hand in hand, and a sister of the female prisoner swore that she had seen the latter sitting on Davis' lap. It was also proved by the brothers and sisters of Mrs. Emory that she had shown great agitation when Davis was accused or suspected of the murder, and cried "The Emorys will hang him yet." These people gave evidence with the utmost candour, and there was not the slightest feeling apparent of any concern as to how the evidence would affect their sister. One of them gave strong evidence against the male prisoner, of the threats made by him some time before, that he would ultimately marry Mrs. Emory, no matter who stood in the way; that he would marry her within a year, and that he would think no more of taking Emory's heart's blood than a dog's. A lad, another brother of Mrs. Emory, proved that Davis had said that he had half a mind to kill Emory with a club. This was about three weeks before the murder. He further gave evidence that he had carried letters from Mrs. Emory to Davis, who

was then in the woods. A cousin of the male prisoner gave evidence that shortly before the murder he had said that he was about to be married to a girl with four M's to her name. On being asked who it was, he said, Miss Mary Martha Masson. No person of that name was known or had been heard of by any of the witnesses.

A constable gave evidence showing the strong feeling entertained by Mrs. Emory for Davis. She frequently asserted that she would willingly die in his stead, that if he were hanged her heart would break, that she would have suffered death before she would have said a word against him, etc.; and upon his trunk being searched there were found letters from her to him, one of which was as follows;

"my dear cousen it is with much pleasure I take my pen in hand to right thes few lines to you i know you like me but i do like you if you loved me as well as i lov you you would be here all the time i know but you do not i see for if you did you would take me to the i love you every day and that is makes me sick so much love is higher then eny other thing my and did tremble so that i could not right plane good by be cind in all you say and that others may be cind to you if you would mary me I would may you dont say know it is to bad that you dont like me for i love you it is to bad you air promised for i love you so well."

There were also found a miniature of Mrs. Emory and a Christmas card on which was written "Mary M. McGarvey, Oh my dear, remember me, E. Davis." Further evidence was given by neighbors to show that the prisoners were frequently together, and that on one occasion when a shot was fired in the woods the female prisoner left her house and went in the direction of the shot and being followed by her husband turned on him and abused him in most fearful language for following her.

The movements of the prisoner, Davis, were traced from the time when he was said to have threatened to shoot Emory. He went from that part of the country to his uncle's some twenty or thirty miles away, got there his rifle which he had previously left in his uncle's charge, and left, saying he was going to be married. His movements were traced from his uncle's

home to a point within half a mile of where the murder took place where he was seen at a time which could not have been more than a few hours, and probably not more than half an hour before the time of the shooting. At this point in the course of the trial a dramatic incident occurred. Davis had throughout been sitting, leaning forward with his mouth partially open, watching the proceedings languidly, and apparently without taking much interest. An old Irishwoman was in the box giving evidence showing that he was near to the place of the murder at a time near to the time at which the murder must have taken place. Upon being asked how she identified him she pointed directly at him with a long skinny finger and said, "I have no difficulty in recognizing him, I know him. He has a tooth out of the front of his mouth. A little boy that was there after he left laughed at him having a tooth out." Upon this being said Davis shut his mouth with a snap, started back, throwing his head up, while his eyes flashed with anger. During the remainder of the trial he never opened his mouth but retained that position so that the tell tale gap could not be seen.

Davis' movements after the murder were traced by unimpeachable evidence. It was shown that he went away from the scene of the murder immediately after it must have taken place, and ultimately hid himself in the woods. Had it not been for suspicion resting upon one of the brothers of Mrs. Emory it might be that he would have escaped entirely. But when she found that one of her brothers was suspected, she permitted herself to be used as a decoy, and brought about Davis' arrest. The following letter was written by her to him:

"Mr. Edwin Davis Millbridge Ont. in hast

"Marmoar September 26th, 1889 oh my Dear Edwin its with mutch truble that i take my pen in hand to let you know that will is dead and the Emoreys has put you down for it he was shot in the march but know one nows how but Emorys say that you dun it and that it was maid up between you and me oh Ed everyone says if you wood come and say i haird you have got a warrent for me i and say i never dun it and i am willing to let them do there worst mr bounter says he

knows it would bee a loot in your favor for he says that their is not a mark nor a brack to bee fond nor thair is no witness agance you but he says if you should hair it and try to get away tht it would bee offle bad agance you oh my darling if you think it is best come at one oh my dear I do wish I could see you right of but know matter what comes or goes i will never beleve that you dun it may god help us both for i dont know the menet their will be a warrent for me but i think that the lord will help us out of our truble oh do come to me at once if you can if i am not at home come right to fathers for i have not been home ever since and i will tell you what to do for i have found out a good dll and the say if the cant pruve inny thung againce you that you can make it hot for george emorey for skendel oh my dear i am so onsey that i dont know what to do my Dear we are all well and i hope you are the same oh my dear dont for get me for i am sure that i never will for get you my dear i think you had better come and sho them that you are not afraid for i know that you nev dun it but do as you think best but the say it would be so mutch better for you for it wood sho them you was innsed and was not afraid to come so good Bye my Dear love."

This letter read between the lines is a curious psychological study.

The evidence against Mrs. Emory proved conclusively that she had reason to believe that her husband would be slain by Davis, but there was nothing to show that she approved of it or took any part in it. The jury after a short absence brought in a verdict of guilty against Davis, but acquitted Mrs. Emory.

A curious point as to the advisibility of evidence arose in this case. There was no ruling upon the point as the Counsel for the Crown decided not to offer the evidence. At the Coroner's inquest a witness had sworn that he had met Emory the night before the murder coming from the hay marsh, that Emory was crying and upon being asked what was the matter he said that Davis had come to him and had said that if he (Emory) would leave the country so that he (Davis) might have Mrs. Emory, he would spare his life, but if not he would kill him. Emory stated to the witness that he had promised Davis to leave the country, but

he said now he had changed his mind and he would take his rifle with him to the swamp and run his chances. It would seem to be fairly clear that this was not evidence, but the fact of it not being so is a striking commentary upon the artificiality of the rules of evidence as administered by our courts. Nine hundred and ninety-nine out of a thousand would say, without hesitation, that a statement of this kind made by Emory immediately before his murder would be strong proof of who the murderer was.

Davis died as stolidly as he had lived; he showed no desire for life or fear of death. Mrs. Emory, it is said, haunted the vicinity of the gaol where Davis was confined until his execution. She afterwards married again.

W. R. RIDDELL.

A contemporary relates the following incident which is worth noting now that attorneys have passed off the scene and solicitors have taken their place: When Lord Tenterden was Chief Justice a gentleman pressing into his Court, which was crowded at the time, complained that he could not get to his counsel. Lord Tenterden: "What are you, sir?' "My Lord, I am the plaintiff's solicitor." Lord Tenterden: "We know nothing about solicitors here, sir. Had you been in the respectable rank of an attorney I should have ordered room to be made for you."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

MORTGAGE—FORECLOSURE – INTEREST—REDEMPTION.

Hill v. *Rowlands* (1897), 2 Ch. 361, is a case touching the law of mortgages. The action was for foreclosure, and judgment had been obtained, and in pursuance thereof an account taken, and a day six months distant appointed for redemption. The defendant desired to redeem at once without the appointment of any day, and claimed that the plaintiff was bound to accept the money at once with interest only up to the date of payment; but the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) agreed with Romer, J., that the usual course of the Court is to allow six months to redeem in order to enable the mortgagor to find the money, and on the other hand to enable the mortgagee to find a new investment, and that after judgment it is not competent for the defendant to dispense with the usual time for redemption, if the plaintiff object. Although before judgment the plaintiff could not refuse to accept the money if tendered with interest to the date of tender. In view of 51 Vict. c. 15, s. 2 (O), and R.S.C., c. 127, s. 7, it is possible that a different view might be arrived at by the Courts in Ontario, where a mortgagor has a statutory right to pay off the mortgagor without notice, or the payment of interest in lieu thereof.

STAYING PROCEEDINGS—NON-PAYMENT OF INTERLOCUTORY COSTS—VEXATIOUS PROCEEDINGS.

In *Graham* v. *Sutton* (1897), 2 Ch. 367, an application was made by the defendants to stay the proceedings until the costs of an appeal had been paid by the plaintiff. The Court of Appeal (Lindley, Lopes and Chitty, L.JJ.), though conceding that according to the modern practice the mere non-payment of interlocutory costs is no longer of itself a ground for staying proceedings by the party in default, nevertheless

ordered the stay in the present case, on the ground that it appeared that the plaintiff had used the process of the Court vexatiously and oppressively.

BICYCLE—ARREST OF RIDER—NEGLECT TO CARRY LAMP.

Hatton v. *Treeby* (1897), 2 Q.B. 452, is a decision on a case stated by justices. By the Local Government Act, 1888, persons riding bicycles at night are required to carry lights. The complainant was riding a bicycle at night without a light and the defendant, a constable, had called on him to stop, and, upon his refusing to do so, had caught hold of the handle bar whereby the complainant was thrown to the ground, and the complainant thereupon summoned the constable for assault. The justices found that the constable did not know the name and address of the complainant, and could not have ascertained them without stopping him, and that in so stopping him he used no more force than was necessary, and they were of opinion that as the complainant was committing an offence punishable on summary conviction, within view of the constable, he was justified in doing as he did, and they dismissed the complaint, subject to the opinion of the Court on the case stated. The Divisional Court (Collins and Ridley, JJ.), however, were of opinion that as the Act gave no power to apprehend without warrant a person committing a breach of its provisions, the act of the constable was illegal, and the appeal was allowed.

FIXTURES—MOVABLE CHATTELS—ANNEXATION TO FREEHOLD—STUFFED BIRD COLLECTION.

In *Hill* v. *Bullock* (1897) 2 Ch. 482, the Court of Appeal (Lindley, Lopes and Chitty, L.JJ.), have affirmed the decision of Kekewich, J. (1897), 2 Ch. 55 (noted ante vol. 33, p. 656), holding that a collection of stuffed birds attached to movable wooden trays placed in iron glass fronted cases affixed to the walls of a mansion house, were not to be treated as annexed to the freehold, but were movable chattels, and did not pass to a tenant for life of the mansion.

COUNTER CLAIM—LIBEL—ACTION BY FOREIGN STATE—ORDS. XXI. R. 15: XIX. R. 27—(ONT. RULES 254, 298).

South African Republic v. *La Compagnie Franco-Belge* (1897) 2 Ch. 487, was an action brought by the plaintiffs (a foreign state) against the defendants for the appointment of a new trustee of a fund raised upon debentures issued by the defendants, and guaranteed by the plaintiffs, and which by agreement of the parties were to be vested in two trustees, one of whom had died. The defendants by way of counter claim set up an alleged libel by the plaintiffs, and claimed damages therefor. On motion of the plaintiffs, North, J. struck out the counter claim and the claim for damages, and his order was affirmed by the Court of Appeal (Lindley, Ludlow and Chitty, L.JJ.), on the ground that if the case had been one between private individuals within the jurisdiction a counter claim for libel in such a case would be struck out, and the defendant left to bring a cross action, as such a claim could not conveniently or properly be tried in an action to appoint a new trustee, and that the fact that the plaintiffs were a foreign state and therefore not amenable to a cross action for libel, was an additional reason why such a claim should not be allowed to be linked on to the present action. And the order was held to be justified by Ord. xxi. r. 15 (Ont. Rule 254), or Ord. xix. r. 27 (Ont. Rule 298).

TRACING DESCENT—HEIR AT LAW—INHERITANCE ACT, 1833 (3 & 4 W. 4, C. 106) SS. 1, 2, (R S.O. (1887) C. 108, S 14).

In re Matson, James v. *Dickenson* (1897) 2 Ch. 509. The question to be determined was the manner in which real estate descends under the old law of descent in force in Ontario prior to the Devolution of Estates Act, 1886, under the following circumstances. The land in question was purchased in 1798 by one James Fictor. He died in 1804 intestate, and leaving one son and two daughters. The son entered as heir at law, and died intestate in 1862, leaving a sister, and a nephew and niece (the children of a deceased sister). The nephew became lunatic, and his moiety was

sold, and on his death the proceeds of the sale devolved as realty, and the question was how the heir to the deceased nephew's moiety was to be ascertained, was the descent to be traced from the original purchaser, James Fictor, or from the mother of the deceased nephew? Kekewich, J., by a judicious extension of the doctrine of *Cooper* v. *France*, 19 L. J., Ch. 313, held that the descent should be traced from the nephew's mother, notwithstanding the words of the Inheritance Act, 1833, s. 2. (R.S.O. 1887, c. 108, s. 14.)

RELIEF OVER AGAINST CO-DEFENDANT.

In re Holt (1897) 2 Ch. 525. This was an action brought against a tenant for life and the executor of a deceased trustee, of a settlement alleging that the deceased trustees had committed a breach of trust by advancing the trust funds to the tenant for life and her husband. The executors in their statement of defence claimed relief over against the tenant for life, a married woman, alleging that the alleged breach had been committed with her consent, and asking to be indemnified out of her interest in the trust estate. No notice had been given to the tenant for life of this claim, but at the trial of the action leave was given to the executors, without going into evidence, to apply in chambers, with reference to enforcing their rights, if any, to indemnity against the tenant for life.

COSTS—INTERLOCUTORY APPLICATIONS ADJOURNED TO TRIAL COSTS RESERVED.

British Natural P. P. Association v. *Bywater* (1897) 1 Ch. 531, was a motion after the trial for certain interlocutory costs, which had been reserved. Bryne, J., who heard the motion, stated that the following directions had been made by the judges as to interlocutory costs, viz.: "Where interlocutory applications have been ordered to stand to the trial, and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. When interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned, in the judgment or order, or allowed on taxation, without the special direction of the judge."

ALIMONY—CRUELTY.

In *Russell* v. *Russell* (1897) A. C. 395, the House of Lords have by a majority of one decided that a false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world, and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation. The Lords in favour of this opinion being Lords Herschell, Watson, Macnaghten, Shand, and Davey, and those of the contrary opinion, Lord Halsbury, L.C., and Lords Hobhouse, Ashbourne, and Morris.

RAILWAY—RIGHT OF RAILWAY TO EXCLUDE PERSONS FROM STATION.

The Perth General Station Committee v. *Ross* (1897) A. C. 479, was an action in a Scotch Court to determine the question how far a railway company has a right to exclude persons not being travellers from admission to their station, or to impose on such persons conditions of admittance. The controversy arose from the fact that the railway company had a hotel in connection with their station, and they refused to admit other hotel proprietors or their servants, except upon the terms that no such persons should wear any distinctive badge or livery. The House of Lords (Lords Halsbury, L.C., Watson, Davey and Macnaghten) reversing the decision of the Scotch Court held that the railway company had the right to do as they had done. Lord Morris, however, dissented from this judgment.

LIFE INSURANCE—PROVISO FOR CASH PAYMENT OF PREMIUM—ONUS PROBANDI—INSURER'S AGENT—PAYMENT OF PREMIUM BY NOTES.

London & Lancashire Life Assurance Co. v. *Fleming*, (1897) A.C. 499, determines a very important point on the law relating to insurance. The action was brought to recover on a policy of life insurance, which contained a provision to the effect that it was not to be in force until the first premium was paid, and that if a note be taken for the first or renewal premium, and not paid, the policy should be void at and from default. The defence was that the premium had not been

paid, and that the policy was therefore not in force. The evidence showed that the agent had accepted a note for the amount of the premium, which note had been discounted, but had not been paid at maturity, but that the agent had been charged with the premium in an account current with the assurance company and had given his note to the company in discharge of the account. At the trial Meredith, C.J. C.P., held that the premium had been paid: the Court of Appeal were equally divided, Hagarty, C.J.O., and Burton, J.A., being of opinion that there had been no payment of the premium established; while Maclennan and Osler, JJ.A., thought the evidence established payment of the premium. The Judicial Committee of the Privy Council (Lords Macnaghten and Morris and Sir R. Couch and Sir Henry Strong) were of the opinion that the onus of proving payment was on the assured and that he had not discharged that onus, that there was no presumption arising from the agent's acceptance of the note, that he was to raise money thereon and pay the premium. Nor did the charging of the premium against the agent by the company in his account create any presumption of an intention on the part of the company to treat their own agent as the agent of the insured, or the policy as subsisting contrary to its express terms, the appeal was therefore allowed and the action dismissed. We may note that the judgment of the Privy Council was delivered by Sir Heny Strong.

MISDIRECTION—WITHDRAWAL OF CASE FROM JURY—SETTING ASIDE VERDICT.

Kingston v. *Kingston* (1897) A. C. 509, was an action of ejectment. At the trial the plaintiffs' title was admitted, and the defendants set up title by possession. Conflicting evidence was offered as to the defendants' possession, and the jury were unable to agree on a verdict for the plaintiff, and they were thereupon recalled by the judge, who directed them that as the plaintiffs had not proved possession by themselves for twelve years prior to the action, their verdict should be for the defendant. This their Lordships of the

Privy Council (Lords Macnaghten and Morris, and Sir R. Couch and Mr. Way), held to the misdirection, and they allowed the appeal and ordered a new trial. In this case the judgment of the Privy Council was delivered by Mr. Way.

AGREEMENT—CONSTRUCTION—MONOPOLY OF SUPPLY.

Kimberley Waterworks Co. v. *De Beers Consolidated Mines* (1897) A.C. 515, was an appeal from the Supreme Court of the Cape of Good Hope, in which the point at issue was the construction of an agreement whereby the defendants agreed, during the continuance of the agreement, to obtain and purchase all the water required for their mines from the plaintiff company, and no other person or company "provided that nothing herein contained shall prevent (the defendant company) from using any water obtained by it from the mines or its wells or reservoirs." The defendants had procured a supply of water for their mines from a municipal corporation gratis, and the question was whether this amounted to a breach of the agreement. The Judicial Committee of the Privy Council (Lords Hobhouse, Macnaghten and Morris, Sir Couch and Mr. Way), were of opinion that it did, and was not within the proviso above referred to.

PAROL EVIDENCE—WRITTEN AGREEMENT.

Bank of Australasia v. *Palmer* (1897) A.C. 540 turns upon a question arising on the the law of evidence. The plaintiff (Palmer) claimed damages for the dishonour of a cheque. He alleged that the cheque was drawn in pursuance of an agreement under which the bank was to allow him an overdraft or cash credit for six months certain, and that it was dishonoured in breach of this agreement. The defendants relied on a letter subsequently signed by the plaintiff, which purported to make the prior agreement terminable at any time at the option of the defendants. The question on the appeal was whether the judge at the trial was right in admitting evidence of a conversation between the plaintiff and the

defendant's agent at the time the letter was signed. The Bank contended that it ought to have been rejected because it was offered in contradiction of the written agreement, or part of the written agreement between the parties. The plaintiff on the other hand claimed it was properly admissible to explain the circumstances under which the plaintiff's name was subscribed to the letter which was no part of the agreement, but which was placed before him for his signature by the defendant's agent after the agreement was concluded. Their Lordships of the Privy Council (Lords Macnaghten and Morris and Sir R. Couch and Mr. Way) were of opinion that the evidence was admissible, notwithstanding that the subsidiary document in effect purported practically to make the prior agreement revocable at the option of the defendants. Lord Morris, who delivered the judgment, says: "Their Lordships cannot help observing that, if the bank should in future contract to advance money for a definite period, and at the same time desire to have the power of recalling the advance at their discretion, thus making the agreement nugatory, it would not be amiss to state clearly, what they do mean, and to take care that their meaning is understood by the person with whom they are dealing."

JUSTICES—DISQUALIFICATION—BIAS.

The Queen v. *Burton*, (1897) 2 Q.B. 468, was an application against two justices to show cause why the conviction of one Young should not be quashed on the ground that Burton, one of the justices, was disqualified. The prosecution was brought at the instance of the Incorporated Law Society against Young for falsely pretending to be a solicitor, and he was convicted and fined 40s. Burton was a member of the society, but no part of the fine was payable to the society. Lawrence and Collins, JJ. refused the motion, being of opinion that the facts furnished no reasonable ground for supposing that there would be any bias on the part of the magistrate. who was not disqualified from acting either on the ground of having any pecuniary interest in the proceedings, or as being a prosecutor. It may be noticed that the motion here was for a writ of certiorari to remove and quash the conviction. In Ontario it has

been customary first to obtain a certiorari, and then, upon the return, to obtain an order nisi to quash. *Reg.* v. *Huggins* (1895) 1 Q.B., 563, noted ante vol. 31, p. 264, was relied on by the applicant, but was held not to be applicable, on the ground that there the prosecution was brought for the benefit of a small class of privileged persons, of whom the justice was one, and in the present case the ordinary members of the Society had no control over or responsibility for any prosecution by the Society, and the case was held to be governed by *Allinson* v. *General Council*, &c. (1894) 1 Q.B. 750, noted ante vol. 30, p. 387.

Correspondence.

DECEIT AND ESTOPPEL.

To the Editor of the Canada Law Journal.

SIR,—Will you allow me to point out that your criticism of my article upon "Deceit and Estoppel" is, in no sense, an answer to it. You assert that the authorities are against me. I granted that much, when I wrote that what I alleged was "not usually said." You agree with me in this, and give citations to prove that we are both right. I contend that for an action of deceit a count, framed in negligence, ought to lie. You say "that such is not the law." Granted.

But should it not be the law? Is, or is not, an action of negligence an action for neglect of duty? Practically, you say: "Yes. But there are neglects of duty, for which negligence will not lie." Deceit, you admit, is a breach of duty; some action will lie for it; but not, you think, an action of negligence. Were it not for authorities, too easily accepted and followed, that is a conclusion which, I venture to say, few would arrive at. Why should we have a class of actions based upon breach of duty, and decree that deceit, the gist of which is breach of duty, should be excluded from it? Following Fry, J., you argue that "fraud imports design and purpose; negligence imports that you are acting carelessly and without that design." But is that distinction supportable?

Suppose that with the design of injuring my neighbour I allow accumulations of water to inundate his mines, am I not liable in an action of negligence? When was a plaintiff non-suited in negligence, because the defendant swore that the act complained of was accompanied by "design and purpose?"

You say that if negligence will lie for deceit that "is tantamount to saying that every cause of action gives rise to an action of negligence, inasmuch as every cause of action arises by reason of a breach of duty, i.e., for a neglect to perform such duty."

For my own part I would not include (in this generalization) causes of action arising out of contract (*a*); although historically much could be said in favour of their inclusion (*b*). But I would quite agree that all torts might be well sued upon as for breach of duty. You would say with Brett, M.R., that there must be "the neglect of the use of ordinary care or skill." I would not choose such language for general statement (although I would grant its perfect applicability to the case which the learned Judge had in hand); but if the word "care" be understood as meaning "care for the rights of others" (and that may well be), then I would agree that neglect of such carefulness is necessary for an action of negligence.

But I would also say that, when a man fraudulently represents to me that a merchant is wealthy, in order to obtain credit for him, from me, such a man is not observing or practising that care with regard to my rights which the law demands of him; that he is guilty of negligence of those rights; that for such negligence (plainly stating it as for breach of his duty to me) he is liable; which is equivalent to saying that I may sue him for negligence.

My proposed work is upon estoppel; not upon deceit.

JOHN S. EWART.

Winnipeg, Dec., 1897.

[We refer to this letter in our editorial columns.—ED. C.L.J.]

(*a*) See *Heaven* v. *Pender*, 1883, 11 Q.B.D., at p. 507.

(*b*) In early periods breaches of contract were so far (even public) wrongs, that judgment for plaintiff was accompanied by a fine to the King.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

Divl. Court.] PETRIE *v.* MACHAN. [Oct. 25, 1897.

Division Court—Jurisdiction—Contract—Fixed amount—Interest.

Defendant by a contract in writing signed by him directed to the plaintiff instructed the latter to sell certain saw mill machinery as follows: "Please enter in your descriptive catalogue of machinery for sale the . . . . to net me $1,000. I hereby authorize you to sell (setting out terms). I retain to myself the right of selling or of exchanging or of otherwise disposing of said goods in whole or in part without the assistance of (plaintiff) but agree in such case to pay you ten per cent. commission on the above amount . . . same commission to apply in case of withdrawal of offer." Defendant gave away the machinery to his brother who afterwards without the assistance of the plaintiff sold it for $350.

Held, that plaintiff was entitled to recover $100 as commission and that his claim was within the jurisdiction of the Division Court. Judgment of Division Court reversed.

R. McKay, for appeal. *Aylesworth*, Q.C., contra.

Boyd, C.] PALMER *v.* MAIL PRINTING CO. [Nov. 1, 1897.

Lease—Agreement as to vacancy—Condition—Breach—Avoidance of lease—Execution—Corporate seal.

In a lease was a provision that "In case the said premises . . . become and remain vacant and unoccupied for the period of ten days . . . without the written consent of the lessors this lease shall cease and be void, and the term hereby created expire and be at an end . . . and the proportionate part of the current rent shall thereupon become immediately due and payable and the lessor may re-enter and take possession" . .

Held, that the term did not cease by the lessee going out and leaving the premises vacant for ten days, but that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors.

Semble. A lease by a corporation is validly executed if the corporate seal is affixed by the proper custodian.

E. B. Ryckman, for plaintiff. *J. B. Clarke*, Q.C., for company.

Street, J.] CONN. *v.* SMITH. Nov. 27, 1897.

Insolvency—Advances by bank to insolvent—Pledge of goods as security—Bank Act—Claim by creditor to recover from bank moneys arising from sale of goods—58 Vict., c. 23, s. 1 (O.)—"Invalid against creditors"—Retroactivity of statute—Warehouse receipts—Exchange of securities—53 Vict., c. 31, s. 75, sub-sec. 2 (D)—Collateral security—Mortgage—Declaration—Parties.

Action by a simple contract creditor of the defendant Smith to recover judgment for a debt, and on behalf of all creditors of Smith to recover from the defendants the Merchants Bank of Canada certain moneys and property of Smith alleged to have come to their hands by means of breaches of the Bank Act. Thirteen transactions were attacked. Eleven of them related to pledges of hay and grain made by Smith to the bank, in or before 1893, to secure advances. The plaintiff alleged that in these transactions there had been no contemporaneous advance, and that the pledge, whether in the form of a bill of lading or a warehouse receipt or a direct pledge, was invalid under s. 75 of the Bank Act, 53 Vict., c. 31. It was not disputed that the bank had before action disposed of the hay and grain, received the proceeds, and applied them in satisfying moneys advanced to Smith.

The plaintiff claimed, as one of the creditors of Smith, who had ceased before this action to meet his liabilities, to be entitled to obtain the moneys so received by the bank, and to apply them in payment of creditor's claims, under s. 1 of 58 Vict., c. 23 (O.) which is as follows: "In case of a gift, conveyance, assignment, or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift . . . was made shall have sold or disposed of the property or any part thereof, the money or other proceeds realized therefor by such person may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift . . . was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor, in case there is no such assigment."

The evidence showed that there was sufficient pressure by the bank to exclude the intent of fraudulent preference in the transactions in question.

Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors, qua creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors.

Held, also, that the Act of 1895 did not apply, because the money had been received by the bank before it was passed, and that it was not retrospective, as was argued, because it conferred a right which had no previous existence, and did more than merely make an alteration in procedure.

The next question concerned a quantity of hops still remaining unsold, which were held for the bank in a warehouse, under a receipt given by Hiscox, the lessee of the warehouse. The defendant Smith was in the habit

of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then at the request of the bank he constituted his bookkeeper, Hiscox, his warehouseman, and Hiscox issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held by the bank, there being no further advance made when the new securities were given. By sub-sec. 2 of s. 75 of the Bank Act, the bank, on receipt of the goods, may store them and take a warehouse receipt for them without forfeiting any existing right.

Held, that this exchange of securities should be treated as authorized under that sub section.

The remaining question related to the rights of the bank under a mortgage upon a block of brick buildings made by Smith to one Steele, and assigned to the bank. The plaintiff asked for a declaration that the advances by the bank upon this mortgage or some part thereof, were contrary to the Bank Act, and that the property was free from the mortgage, or that the amount received under it might be paid into Court, and applied in payment of the claims of Smith's creditors.

Held, that no such declaration should be made in the absence of Steele, who was liable to the bank as endorser of a promissory note of Smith for 8,000 collateral to the mortgage.

Aylesworth, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendants.

Ferguson, J.] NEIL *v.* ALMOND. [Dec. 13, 1897.

Execution against lands—10 years old—Renewal—Lien money charged upon land—Proceeding under fi. fa.—R.S.O. c. 111, s. 23.

The right of an execution creditor under a fi. fa. lands is a "lien," the money mentioned in it is money "charged upon lands" taking steps to sell under it is a "proceeding" under above statute: and such proceeding under a fi. fa. more than ten years old even although renewed from year to year will be enjoined.

W. H. P. Clement, for purchaser. *W. H. Blake*, for execution creditor. *R. B. Beaumont*, for a mortgagee.

Meredith, C J., Rose, J., MacMahon, J. CONNOLLY *v.* DOWD. [Dec. 14, 1897.

Discovery—Examination of party—Residence out of jurisdiction—Subpœna—Special order.

Appeal by the plaintiff from an order of FALCONBRIDGE, J., in Chambers, affirming an order of the Master-in-Chambers, requiring the plaintiff to attend, at his own expense, for examination for discovery pursuant to a subpœna and appointment served upon him at Toronto for his examination there, he being only temporarily in Toronto when served, his residence being out of the jurisdiction, and he having failed to attend for examination pursuant to the subpœna and appointment.

D. Armour, for the plaintiff, contended that he could not be required to attend upon payment of ordinary conduct money, or without a special order, the Rules only providing for the examination at Toronto of parties resident in the county of York.

J. M. Clark, for the defendant Dowd, contra.

Held, that, owing to the changes in the Rules since *Comstock* v. *Harris*, 12 P.R. 17, that case is no longer an authority, and a party residing out of the jurisdiction cannot now be examined in the way that was attempted here. Rules 439, 443, 477.

Appeal allowed with costs to the plaintiff here and below in any event.

Armour, C.J., Falconbridge, J. } LIEZERT *v.* TOWNSHIP OF MATILDA. [Dec. 14, 1897.

Municipal corporation—Injury from non-repair of highway—Notice of damage.

Held, that the provisions of sec. 531, sub-sec. 1 of the Consolidated Municipal Act, 1892, as amended by 57 Vict., c. 50, s. 13, and re-amended by 59 Vict., c. 51, s. 30, as to the notice requisite to be given to municipal corporations, in order to hold them liable for accidents arising from non-repair of highways, are applicable only to cases of actions brought against a township, city, town, or incorporated village alone, and not to cases brought against two or more of them, as, in this case, against a township and an incorporated village jointly.

The cause of action is still a several one as regards each corporation, although the statute requires that both shall be joined in the action; and although the plaintiff may have failed against one corporation by reason of want of notice to it, he may still be entitled to recover against the other corporation which had due notice.

I. Hilliard, for plaintiff. *A. Johnston*, for defendants.

Meredith, C.J.] LIGHT *v.* HAWLEY. [Dec. 15, 1897.

Chattel mortgage—Validity of—Security taken in name of trustee—Affidavit of bona fides—Conversion of goods—Measure of damages—Amendment—Adding claim—Pleading

A chattel mortgage to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged chattels, it was contended that the mortgage was invalid because the mortgagee could not properly make the usual affidavit of bona fides, as there was no debt due to him.

Held, notwithstanding there was nothing on the face of the mortgage to show the fiduciary position of the mortgagee, that the mortgage was valid.

Brodie v. *Ruttan*, 16 U.C.R. 209, applied and followed.

At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under

the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power.

Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods.

Clute, Q.C., and *John English*, for the plaintiff. *J. L. Whiting*, for the defendant.

Boyd, C., Ferguson, J.
Robertson, J. } O'CONNOR *v.* GEMMILL. [Dec. 18, 1897.

Solicitor—Services in Exchequer Court of Canada—Agreement with client—Compensation en bloc—Invalidity—Champerty—Ascertainment of proper compensation—Taxation—Quantum meruit.

The action was against a firm of solicitors for an account of moneys received by them for the plaintiff in respect of a claim against the Crown, for which action was brought by them for the plaintiff in the Exchequer Court of Canada, and the claim compromised. In answer to the action the defendants set up an agreement with the plaintiff by which they were to receive for their services one-fourth of the amount recovered for her. This agreement was attacked by the plaintiff as champertous and otherwise void. By a consent judgment a reference was directed to a taxing officer, who found that the agreement was invalid, and that the defendants should deliver a bill of costs for their services, which should be taxed.

Held, that the agreement was invalid, and was no bar to the investigation of what was fairly due to the defendants.

Ball v. *Warwick*, 50 L.J. N.S. Q.B. 382, and *In re Attorneys and Solicitors' Act*, 1 Ch. D. 573, referred to.

The solicitors were not engaged or doing business as officers of the Courts of Ontario, and were not acting under the provisions of the Solicitors Act, R.S.O. c. 147. Their services were rendered as solicitors of the Exchequer Court of Canada. Though they obtained their status as solicitors of that Court because they were already solicitors in Ontario, yet their acts were not as solicitors in any Court in this Province, and they were not subject to the summary jurisdiction affecting officers of the Ontario courts, nor to the special restrictions and rules affecting solicitors' costs and charges found in s. 31 et seq. of R.S.O. c. 147.

Williams v. *Odell*, 4 Pri. 279 *Re Anonymous*. 19 L.J. N.S. Ex. 219, and *Re Johnson*, 37 Ch. D. 433, 15 App. Cas. 203, referred to.

The solicitors must be left to the remedies given by the general law, *i.e.* in the absence of a tariff of costs between solicitor and client in the Exchequer

Court, they must recover upon a quantum meruit, and upon such evidence as was appropriate in the forum of litigation, in this case the Province of Ontario. *Paradis* v. *Bosse*, 21 S.C.R. 419, and *Armour* v. *Kilmer*, ante p. 29, referred to.

F. A. Anglin, for the plaintiff. *Arnoldi*, Q.C. for the defendants.

Robertson, J.] IN RE DOWLER *v.* DUFFY. [Dec. 27, 1897.

Division Court—Garnishee—Judgment summons—Committee—Examination—Affidavit—R.S.O. c. 51, s. 235—57 Vict., c. 23, s. 18.

The County Court Judge, presiding in a Division Court has no power to commit a garnishee for default in making payments pursuant to an order after judgment; and s. 18 of 57 Vict., c. 23, has not extended his powers in that behalf.

Before a garnishee can be examined under ss. 235 to 248 of R.S.O., 1887, c. 51, as now permitted by s. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by s. 235.

H. J. Duncan, for the garnishee. *Masten*, for primary creditors.

Rose, J.] [Dec. 30.

BANK OF TORONTO *v.* INSURANCE COMPANY OF NORTH AMERICA.

Particulars — Application for — Close of pleadings — Affidavit—Necessity—Trial.

After issue joined upon the statement of defence, the plaintiff cannot obtain an order for particulars of the defence without an affidavit showing the necessity for particulars. They cannot be for the purpose of pleading, and there must be evidence that they are required for the purpose of trial. *Smith* v. *Boyd*, 17 P.R. 463; 33 C.L.J. 435, followed.

R. McKay, for plaintiffs. *Ryckman*, for defendants.

Boyd, C., Rose, J. } [Jan. 3.
Falconbridge, J. } REGINA *v.* STERNAMAN.

Criminal law — Murder — Poisoning — Design—Evidence—Admissibility—Death of former husband of prisoner.

Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his illness, it was proved that his death was due to arsenical poisoning. In order to show that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning.

Held, that the evidence was admissible.

B. B. Osler, Q.C., and *J. R. Cartwright*, Q.C., for the Crown. *W. M. German*, for the prisoner.

Boyd, C.] BRERETON *v.* CANADIAN PACIFIC R. W. CO. [Jan. 4.

Jurisdiction of Ontario Courts—Injury to land in another province—Local or transitory action.

The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate.

Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario Court; but aliter as to the furniture.

Companhia de Mocambique v. *British South Africa Co.*, (1892) 2 Q.B. 358, (1893) A.C. 602, followed. *Campbell* v. *McGregor*, 29 N.B. Reps. 644, not followed.

Shepley, Q.C., for plaintiff. *Aylesworth*, Q.C., for defendants.

Rose, J.] GOLD MEDAL FURNITURE CO. *v.* LUMBERS. [Jan. 5.

Landlord and tenant—Agreement for termination of tenancy—"Disposing of" demised premises—Notice to quit—False representation—Covenant for quiet enjoyment—Disturbance—Breach—Acquiescence—Damages.

The plaintiffs were lessees of the defendant of part of a factory, under a lease made in pursuance of the act respecting short forms of leases, which contained a proviso that in the event of the defendant disposing of the factory, the lessees should vacate the premises, if necessary, on notice or payment of a bonus. Shortly after the lease was made, the defendant notified the plaintiffs that he had disposed of his interest in the factory premises, and they would be required to vacate the portion occupied by them. The plaintiffs vacated the premises, under protest, and brought this action for damages for fraudulent representations. By an agreement made between the defendant and G., it was recited that the parties "desire so to manage and deal with the said lands and premises as to cause the same to return an income greater than the expenditure now required to be made"; and it was provided that G. was to have superintendence of the building and of obtaining tenants at rentals greater than the rentals then being received; that the defendant was to advance money to make improvements; that whatever G. did was to be done for and in the name of the defendant, who was to collect all rents and returns; the leases to be in the defendant's name, and the tenants to be his tenants. Then there was a provision for a sub-lease of the premises to G. upon the happening of certain events, at a named rent, and for an option for purchase by G. at a fixed price at any time before the expiration of the sub-lease.

Held, that the defendant had not by this agreement disposed of the fac-

hin the meaning of the proviso in the plaintiffs' lease ; but, as the nt had not intentionally, wilfully, or maliciously misled the plaintiffs, and ng in good faith upon what he believed to be his rights, there was no d fraudulent representation to the plaintiff. *Peek* v. *Derry*, 14 App. , followed.

d, however, that the plaintiff was entitled to succeed for a breach of nant for quiet enjoyment of the premises "without interruption or nce from the lessor;" for where the lessor covenants against his own s not material whether the act assigned as a breach was lawful or l ; and the acts here done were in breach of the covenant, for the nt had no right to give the plaintiff notice to quit, and no right to n that the plaintiffs acted upon the notice without waiting for an o be brought. *Edge* v. *Boileau*, 16 Q.B.D. 117, followed. *Cowling on*, 45 U.C.R. 94, 5 A.R. 549, discussed.

vas urged that an agreement made after the notice to quit, under ne plaintiffs vacated the premises before the day named in the notice, acquiescence in the defendant's demand.

d, not so ; the plaintiffs went out under protest, and going out earlier essened the damages. The damages to be assessed upon the same e as in the case of an eviction.

H. Blake, Q.C., and *F. C. Cooke*, for plaintiffs. *Watson*, Q.C., and *noke*, for defendant.

.] WARREN *v.* VAN NORMAN. [Jan. 6.

Right of—Prescription — Termini—Slight deviations—Interruptions.

e evidence showed that the plaintiff and his predecessors in title had ards of twenty years before the commencement of the action used and as of right a way over the defendant's land from the plaintiff's land to ay. The termini a quo and ad quem had not varied during the twenty out at two points, about fourteen years before action, one of the plain- decessors slightly altered the line of the way for the purpose of going muddy spots, and the user of the original line at these two points was ed for the substituted one. These deviations were short as compared length of the way.

d, that they did not operate to do away with the plaintiff's right to claim between the termini, that way having been substantially used during le period ; and the plaintiff was entitled to have his right to the way the termini declared, but should be confined either to the original or ed line. *Wimbledon, etc., Conservators* v. *Putney*, 1 Ch. D. 362, Gale ments, 6th ed., p. 327, *Rouse* v. *Bardin*, 1 H. Bl. 352, and *Payne* v. , 1 M. & R. 382, referred to.

ght interruptions by the defendant were insufficient to prevent the from running. *Carr* v. *Foster*, 3 Q.B. 581, and *Flight* v. *Thomas*, E. 688, referred to.

A. Hutcheson, and *A. A. Fisher*, for plaintiff. *Britton*, Q.C., and *Carroll*, for defendant.

Boyd, C., Ferguson, J.
Robertson, J. } IN RE LUCKHARDT. [Jan. 10.

Dower—Mortgaged lands—Purchase of equity of redemption—Discharge of existing mortgage—New mortgage—Registration—Equitable dower—42 Vict., c. 22—Legal estate—Momentary seisin.

A married man, making a purchase of certain lands, as part of the consideration, paid off an existing mortgage and obtained a statutory discharge in favour of his vendor. On the same day the vendor executed a conveyance to him, and he executed the mortgage in which his wife joined to bar dower, in favour of the vendor, to secure the balance of the purchase money. All three instruments were registered on the same day, the discharge first, the conveyance second, and the mortgage third. The purchaser subsequently made another mortgage, his wife again joining to bar dower, under which the lands were sold.

Held, affirming the judgment of ROSE, J., (ROBERTSON, J., dissenting), that the dower of the wife of the purchaser did not attach.

Per FERGUSON, J.: The right to equitable dower in cases other than those where the equitable estate comes into existence by the husband, being the owner of the land, executing a mortgage upon it in which the wife joins to bar dower, is unaffected by 42 Vict., c. 22, and stands as it stood before that Act was passed; and as in the present case the husband was not, at the time of the making of the mortgage, the owner of the land, but there was an outstanding mortgage upon it made by one who was or had been the owner, the case did not fall within the statute, and the appellant was not entitled to the new right spoken of in *Martindale* v. *Clarkson*, 6 A.R.I.

It was contended that the husband became entitled to the legal estate at the time of the discharge of the mortgage which was in existence when the equity of redemption came into his hands, and when he gave back another mortgage for part of the purchase money; but this contention could not prevail; upon the registration of the discharge, the legal estate which the mortgagee executing the discharge had, went directly to the purchaser's then existing mortgagee, without passing even momentarily through the purchaser.

W. Davidson, for Luckhardt. *J. C. Haight*, for receiver.

Armour, C J.,
Street, J. } BANK OF TORONTO *v.* QUEBEC FIRE INS. CO. [Jan. 17.

Discovery—Examination of officer of company—Assignor of chose in action—Rules 439, 441.

Rule 441 of the Rules of 1897 provides that where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery.

Held, that this rule could not be extended by reference to Rule 439 or otherwise, to the examination of an officer of a corporation, the assignors of a chose in action.

R. McKay, for plaintiffs. *L. G. McCarthy*, for defendants.

Armour, C.J., Street, J.] JOHNSTON *v* GALBRAITH. [Jan 17.

Division Court—Appeal from—Issue as to satisfaction of judgment—Prohibition—Chambers.

An appeal by the plaintiff from an order of the Judge of the County Court of Halton dismissing an application by the plaintiff for a new trial of a question or issue tried by the Judge, upon oral evidence, in Division Court Chambers, as to the satisfaction of a judgment recovered by the plaintiff in the 2nd Division Court in that county. The plaintiff moved, in the alternative, for prohibition.

Held, that the appeal did not lie, and the application for prohibition should be made in Chambers.

R. S. Appelbe, for plaintiff. *D. O. Cameron*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

CROWN CASES RESERVED.

Full Court.] THE QUEEN *v.* HARTLEN. [Jan. 11.

Unnatural offence—Boy under age of fourteen held incapable of committing—Assault—Code s. 260.

Defendant, a boy under the age of fourteen years, was tried before the judge of the county court for the County of Halifax, and convicted of the offence of committing an unnatural offence upon the person of a younger boy.

Held, that at common law (which, in this particular, was unchanged by anything in the Criminal Code) defendant was incapable of committing the offence charged, and that the conviction must therefore be set aside.

Per RITCHIE, J.: If the act was committed against the will of the other party defendant could be punished for an assault under sec. 260 of the Code.

Attorney General, for Crown. *J. J. Power*, for prisoner.

Full Court] THE QUEEN *v.* TROOP. [Jan. 11.

Assault causing bodily harm—Rejecting of evidence as to statements made by witness before magistrate inconsistent with statements on trial—New trial.

Defendant was indicted, tried and convicted for an assault committed upon S., causing actual bodily harm. At the trial counsel for defendant, who gave evidence on his own behalf, proposed to ask certain questions with the view of showing that one of the principal witnesses for the prosecution when examined before the committing magistrate made statements at variance with her testimony given upon the trial of the indictment. The trial judge having rejected the evidence,

Held, that he erred in doing so, and that there should be a new trial.

The statement proposed to be given in evidence was one made by the witness as to what she and the accused said at the time the assualt was alleged to have been committed.

Held, that this was material to the matter in issue, and part of the res gestæ, and could be contradicted under the statute. Code ss. 700-701.

Attorney-General, for Crown. *W. E. Roscoe*, Q.C., for prisoner.

Full Court.] THE QUEEN *v.* CORBY. [Jan. 11.

Theft—Improper comment by prosecuting counsel on trial—New trial—Dominion Acts, 1893, c. 31, s. 4, sub-sec. 2.

Defendant was indicted for stealing a quantity of pine oil. He pleaded "not guilty," and on the trial gave evidence on his own behalf. The prosecuting counsel in addressing the jury commented unfavorably on the failure of the defendant's wife to testify.

Held, that the comment was a violation of the provisions of the Act (Acts of 1893, c. 31, s. 4, sub-sec. 2), and that defendant was entitled to a new trial.

Attorney-General for Crown. *A. Drysdale*, Q.C., for prisoner.

Full Court.] THE QUEEN *v* DAVIDSON. [Jan. 11.

Murder—Dying declaration—Belief of impending death.

On the trial of defendant on an indictment for the crime of murder, the Crown offered in evidence the dying declaration of the deceased, as follows: "He said he was shot. I said 'Do you really say you are shot?' He said 'I am shot in the body. I am going fast.' I said, 'Can't you take my arm and I will take you away.' He said, 'I can never walk again.' I said, 'For God's sake who shot you?' He said, 'Henry Davidson shot me. God help him. I hope he will not be hanged for it.'"

Held, that the evidence showed that deceased was speaking under a sense of impending death, and that the statement then made was properly received.

Held, further, that the fact that deceased asked for a doctor did not lead necessarily to the conclusion that he had still some hope of living.

Attorney-General, for Crown. *C. E. Gregory*, for prisoner.

Province of New Brunswick.

SUPREME COURT.

Vanwart, J. In Chambers. } KELLY *v.* KELLY. [Nov. 18, 1897.

Justices Court—Evidence—Title to land—Consent does not give jurisdiction.

Action in a Justices Court on a promissory note by endorsee against maker (the note having been endorsed to plaintiff after maturity). The defendant disputed liability on the ground that he had given the note for cordwood,

which had been cut on land owned by A., but which he discovered had been cut on Crown land adjoining A.'s lot, and on which defendant had a license from the Crown to cut. There were no lines run between the lots in question, and on the trial the issue was as to the title to the land on which the wood was cut, defendants' counsel stating that he would not object to the Justice's jurisdiction on the ground of the title to land coming in question. Defendant, subject to objection, gave evidence of his license to cut without producing the license. The Justice found that the wood was cut on the Crown land, but gave a verdict for the plaintiff for the amount of the note, less $4, deducted for stumpage. Defendants' counsel, on review, relied solely on the ground that the Justice having found that the wood was cut on the Crown land on which defendant held a license to cut there was no consideration for the note.

Held, that the evidence of the license being improperly estimated defendant had failed to make out a good defence, but that there must be a non-suit on the ground of the title to land coming in question, notwithstanding the agreement of the parties that the question should be tried by the Justice.

C. E. Duffy, for plaintiff. *C. W. Beckwith*, for defendant.

North-West Territories.

SUPREME COURT.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

Richardson, J.] WOLF *v.* KOCH. [Nov. 4, 1897.

Practice—Judicature ordinance—Default judgment— Order dispensing with production of original writ—Endorsement of service of writ—Motion to set aside judgment—Irregularity.

Judgment in default of appearance. Material: Affidavit of bailiff dated Feb. 4th, 1895; of service on defendant at his residence; of copy of writ and statement of claim annexed to affidavit. On an affidavit of sheriff that bailiff had informed him he served original instead of copy of writ, an order, dispensing with production of original was made on April 6th, 1895, date of judgment, by Judge in Chambers was tried according to s. 30, sub-sec. 11 of the Judicature Ordinance. Original writ was not annexed to affidavit of bailiff; but copy writ bearing no endorsement signed by him, but merely an unsigned endorsement in handwriting of sheriff.

Affidavits filed on behalf of defendant deposed that he never resided at alleged place of service, that he was never served with writ or copy, and that he first became aware of proceedings by seizure by sheriff Sept. 21st, 1897, under writs of execution issued April 6th, 1895.

Held, that the weight of evidence showed non-service, that no affidavit of service had been filed in compliance with s. 80 of Jud. Ord. since the affidavit required was one of facts within deponent's own knowledge, and that affidavit of sheriff did not remedy defect in bailiff's affidavit, that Rule 15 of Order 9 of Rules of Supreme Court, England, 1883, is applicable in N.W.T. and

requires endorsement of service of writ, and that the application was made within a reasonable time. Further that the order made under s. 30, sub-sec. 11, did not dispense with proper proof of service of the original writ.

Order setting aside judgment, costs to defendant, no action against sheriff.

Rimmer, for defendant. *Ford Jones*, for plaintiff.

Book Reviews.

American Law Review.

Mr. Irving Browne writes an article for the last number on "The Allurement of Infants" in his usual sprightly style. The policy of modern law for the protection of juveniles, and the leading cases on the subject are discussed. The following is his conclusion: "Let me suggest that the leaning of judges in this matter is probably much influenced by their observation of their own small sons if they have any. Years ago I regarded the prevailing doctrine of the turntable case askance, but since I have been blessed and bothered with a grandson, I have become quite reconciled to it, and I own my allegiance to the Kansas judge who said: 'Everybody, knowing the nature and instincts common to all boys, must act accordingly.'"

Political Science Quarterly. Gunn & Co., 9 & 13 Tremont Place, Boston.

The December number of this excellent periodical, edited by the Faculty of Political Science of Columbia University, contains articles on a variety of subjects of interest to the general reader, and concludes with a valuable record of political events.

The Living Age, Boston, U.S.

During the year now closing the *Living Age* has embraced a wider field than heretofore. The periodical literature of France, Germany, Spain, Italy, and other continental sources, has been searched, and choice selections given from prominent writers. In addition a monthly supplement has been given, devoted to leading American periodicals and readings from new books, thus giving to the reader for the past year over 3,500 pages of most interesting reading.

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BOOKS RECEIVED.

Beach on Trusts and Trustees—Central Law Journal Co., St. Louis, Mo., U.S.
Schoules on Bailments—Little, Brown & Co., Boston, U.S.
Alger on Promoters—Little, Brown & Co., Boston, U.S.
Gillett on Evidence—Bowen, Merrill Co., Indianapolis, U.S.
Law Quarterly Review—Stevens & Sons, London, Eng.
Wait on Engineering, &c., Jurisprudence—John Wiley & Sons, New York.
Newell on Libel and Slander—Callaghan & Co., Chicago, U.S.
Legislative Power in Canada—By A. H. Lefroy. Toronto Law Book Co.

Canada Law Journal.

VOL. XXXIV. FEBRUARY 15, 1898. NO. 4.

The Department of Justice has accorded the reporters of the Supreme and Exchequer Courts of Canada the privilege of holding briefs in those Courts. The reporters of the Ontario Courts enjoy a like privilege, and the English custom has always been to allow the reporters to practice as counsel.

Very many there are of the profession in the Eastern Provinces that have flocked to British Columbia. It is therefore of interest to note a decision of Drake, J., on an application by a solicitor of the North-West Territories for an order on the Law Society of British Columbia to compel them to admit him as a solicitor for that Province. The applicant was a solictor in N.W.T., where three years is the compulsory time to study. After having been admitted he complied with the regulations affecting the profession in Manitoba, where five years is the required period, and was admitted as a solicitor there. The B.C. Law Society rejected his application on the ground that having obtained the status of a solicitor in a place where five years study is not compulsory, he could not (by being admitted in Manitoba, where five years is compulsory) claim admittance in British Columbia without completing the full term of five years as a student. The learned judge held, however, that the applicant could select whichever of those various admissions most nearly fulfilled the requirements of the Act, and that if it were intended that five years' study should be essential to the application before he could obtain admittance, the Act would have said so. He also considered that the applicant should not be prejudiced by the delay, and said that if he had the power he would order that the notice should be given nunc pro tunc.

At a recent trial at the Assizes in Liverpool Mr. Justice Bruce, in the absence of counsel who had been retained for one of the parties, permitted his solicitor to examine the witnesses and address the jury on behalf of his client; and see 80 L. T. Jour. 156, 157. In 1895 a solicitor claimed the right to be heard before the Irish Privy Council on behalf of his client, but he was refused audience; in that case it did not appear that counsel had been retained: see 100 L. T. Jour. 45. In *Reg.* v. *Maybury*, 11 L. T. 566 it was held that where a party appears in court by counsel and the case is on, and the counsel has been fully seized of it, his authority cannot be revoked by his client so as to give his client the right himself to address the court. But if counsel is not seized, as when upon a motion, the hearing has proceeded no farther than the reading of affidavits, and the counsel has addressed no arguments to the court, he may in that case at the instance of his client, be permitted to withdraw, and the client himself may be heard. In *Newton* v. *Chaplin*, 10 C. B. 356, a plaintiff, who was a barrister, was not allowed to be heard on his own case, after his counsel had addressed the court, and in a recent case in the Supreme Court the counsel for one of the parties having been heard out of his turn and having left the court, his client claimed the right to be heard on points subsequently raised by the counsel on the other side and not touched upon by his own counsel, but his application was refused.

We publish in another place the recent judgment of the Supreme Court of Nova Scotia in *The Queen* v. *Halifax Electric Tramway Co.*, which brought up for consideration the law affecting Sunday observance in relation to the legislation of that province touching the question, the Court holding (the Chief Justice dissenting), that the Provincial Legislature has no power (except possibly in certain particulars) to deal with the question. The case is one of general interest, especially in Ontario, and we therefore publish the judgments in extenso, although it only bears

indirectly upon the law in that Province. In connection with this case an interesiing questiop may arise, which has only been touched upon in one of these judgments. The principle has now been well settled by the Privy Counеil, that in many matters which may be dealt with by the Dominion Parliament, under the power possessed by them under s. 91 of British North America Act, so long as the Dominion has not legislated on the subject, the Province may deal with them under clause 16 of s. 92, as matters of a private or local nature. This doctrine was, we think, first hinted at in a judgment given by the late Lord Selborne in *L'Union St. Jacques* v. *Belisle*, L.R. 6 P.C. 31. It has also been spoken of in several other cases, but perhaps most clearly in the prohibition case, (App. Cases, 1896,) where the Ontario local option law was upheld on the ground that so long as the Dominion did not exercise its powers, and cover the whole ground by enacting a prohibitory law or something equivalent to it, the province might pass a local option law, which would be valid, although it would be superseded by any Dominion legislation which might be passed covering the same ground.

THE LIMITS OF JUDICIAL AUTHORITY.

The question incidentally discussed in a former issue as to the right of a court of law to exercise jurisdiction over matters in controversy seems worthy of a little further consideration. It must be conceded that no court has an unlimited and arbitrary right to exercise its jurisdiction at pleasure, but on the contrary that the right of all courts of law to exercise their jurisdiction is governed and circumscribed by common law. In order that any court may properly exercise its jurisdiction, as a general rule, its assistance must be invoked by some person or persons having a right to invoke it, and except in certain exceptional cases, e.g., such as calling upon an officer of the court to answer for his conduct, the court never acts except upon the due and proper application of a suitor —and even then the court does not acquire a general and

unlimited jurisdiction either over the litigants personally, or over the subject matter of the controversy, but its jurisdiction is confined to the adjudication of the matter presented for its decision; and only as far as may be necessary for the purpose of giving due effect to its decision can it properly exercise jurisdiction on the person of the suitor.

The right of a suitor to invoke the jurisdiction of the Court for any specific object is not, however, and ought not to be hampered by the imposition of any liability to submit not only the matter in controversy, but all his other acts and deeds, to the inspection and judicial determination of the court. It is a self-evident proposition that if a man brings an action to recover a promissory note, that gives the court no right, ipso facto, to proceed and enquire whether he has been guilty of libelling the defendant. This may be considered a reductio ad absurdum, but cases of that kind very often serve best to illustrate principles. It is on the principle we have referred to that the court acts when it requires an undertaking to be given by a plaintiff to abide by the order of the court as to damages as a condition of granting him an interlocutory injunction; because without that undertaking the court would have no inherent jurisdiction in a suit brought by the plaintiff to visit him with damages, however much he might be thought to have been in the wrong in his suit; and consequently but for such undertaking the defendant, injured by the granting of the injunction, might be driven to a cross action or counter-claim.

It is for the same reason that in England it has been always customary to insert in orders for the taxation of a solicitor's bill on the application of his client, a submission to pay what is found due, on such taxation, (and see Ont. Rules, Forms 99, 101) because without that submission the court would have no inherent power on the client's application for a taxation to make an order for payment by him, in the absence of any rule or statutory provision, enabling it to do so, and the solicitor would be driven to an action to recover what might be found due to him. It is upon this principle

also that the court sometimes, as a condition of giving costs, requires from a litigant an undertaking not to bring an action. It is always open to the litigant to refuse to accept costs on any such condition, and wherever a suitor is entitled to relief ex debito justitiæ the court has no right to clog the relief with any such conditions.

It was on this principle too that the procedure by counter-claim seems to have been introduced, whereby a defendant is enabled to assume the character of a plaintiff without bringing a cross action; but a counter-claim, for all practical purposes of giving the court jurisdiction to determine the matters in controversy in, or give the relief claimed by, the counter-claim, is a cross action.

It would occasionally seem, however, that there is some danger of this fundamental principle of litigation being lost sight of in Ontario, and, under the growing laxity of practice which prevails under the Judicature Act, thoughtlessly to assume that it no longer exists, and that a court is now competent to adjudicate, and make judgments, against persons who have neither invoked, nor are properly amenable to its jurisdiction, or respecting claims or controversies which have not been presented for adjudication. But we may ask if Smith, having no shadow of title, bring an action against Brown to recover possession of land, on what principle can Brown be thereby involved in an enquiry as to his title as against some third person who is made a co-defendant, but who makes no claim adverse to Brown: and does it make any material difference if it is a fund instead of land which is the subject matter of Smith's action? The jurisdiction of the court is invoked by Smith to determine whether he is entitled to the land or fund, and if he fail to establish any claim, what right has the court, unless a counter-claim be filed, to exercise any other jurisdiction over the subject matter of the controversy than to dismiss Smith's action? The mere fact that Smith has made a wrongful claim does not surely give the court unlimited jurisdiction to deal with the subject matter of the litigation, and the mere fact that there are other claimants who have not invoked the jurisdiction of the

court to determine their rights, can surely give the court no authority voluntarily to assume the right to adjudicate upon them.

It is quite clear that the mere existence of a dispute gives a court of law no the right to step in and adjudicate upon it, nor does the mere fact of the existence of property confer any right on a court to proceed to enquire and adjudicate as to its ownership.

Her Majesty's subjects are entitled to settle disputes without resorting to her courts of law, and it seems almost a self-evident proposition that the making of a wrongful claim to property does not ipso facto give a court a right to adjudicate upon any rights affecting such property except so far as it is called upon to do so for the purpose of determining the claim presented for adjudication.

Two cases of the highest authority in the recent number of Appeal Cases may serve to show the accuracy of the view we have endeavoured to enunciate. *Hood Barrs* v. *Crossman*, (1896), A.C. 172, was a summary application made against the defendant's solicitors in an action, to compel them to repay certain costs which had been ordered to be paid to the defendant by a judgment which had been subsequently reversed. The costs had been paid, under threat of execution, to the solicitors, but without any undertaking on their part to refund. The House of Lords held that the Court had no jurisdiction to order the solicitors to refund. In giving judgment Lord Herschell said: "It is to be observed that nothing is more common than for the court when refusing to stay execution and allowing costs to be received, to require the solicitor who is to receive them to give a personal undertaking to repay them if the Court of Appeal should reverse the order for payment. My Lords, the fact that such undertakings are constantly given, is, to my mind, almost conclusive against the notion that the court has power where no such undertaking has been required and given, to order the solicitor to repay the costs."

Here was the case of an officer of the court who had received money for his client, which the court had ordered to

be refunded by the client, but the court had no jurisdiction to exercise any personal jurisdiction over the solicitor to compel him to return it, he having been guilty of no misconduct, and not being amenable to the jurisdiction of the court.

The other case to which we refer is *Grey* v. *Manitoba & N. W. Ry.*, (1897) A. C. 254, where the Privy Council refused to hear argument upon, or consider certain questions which had not been raised either on the pleadings or evidence, and on which the court below had not adjudicated. Their lordships as to that point say: "They confine themselves to deciding the issues which the courts below were invited by the plaintiff to decide." Thus clearly intimating that the duty of a court of law is to decide the matters presented for adjudication, and not to pronounce judgment on other matters which the litigants have not thought fit to put in issue, or bring into controversy.

'OBITER DICTA.'

Beyond the fact of his visit to this country with Lord Russell of Killowen a year or two ago, Sir Frank Lockwood, Q.C., was so widely known by reputation to the profession in Canada that the news of his untimely death in December was received with profound regret. His handsome presence and charming personality won upon everyone with whom he came in contact here, and he somewhat overshadowed Lord Russell in popularity with the Canadian people. Without being a great lawyer, his admirably balanced professional qualities gave him a standing not measurably behind the leaders of the English Bar. His chief forensic successes were obtained at nisi prius, a congenial sphere for the exercise of his nimble wit; and he leaves behind him many a *mot* and clever turn of advocacy to embalm his memory there. Sir Frank was also well known as a caricaturist, and his humorous drawings have served to while away many a tedious quarter-hour of Parliamentary debate and jury trial. Mr. Justice Darling is under obligation to him for the only real bits of humour in

"Scintillae Juris"—the frontispiece and colophon, both of which are good specimens of the deceased lawyer's remarkable skill with the pencil. His literary endowment was not large, the only exhibit we have of it subsisting in "The Law and Lawyers of Pickwick," a mere brochure, published in 1894. Sir Frank Lockwood died in the prime of manhood, and without realizing his cherished ambition of becoming a Judge, but he has left to his friends the abiding fragrance of the "integer vitæ, scelerisque purus," and that is a memorial far more to be desired than the greatest judicial reputation that ever was made.

* * *

Our English contemporaries announce, with sang froid born either of resignedness to the tyrrany of London weather or lack of sympathy for the epicurism of circuit leaders, that Mr. Ambrose, Q.C., M.P., was prevented by fog from attending the recent Northern Circuit dinner to Mr. Justice Bigham at the Hotel Metropole. Having been cruelly buffetted about by surging cabs and derelict omnibuses in the north-western part of the city for upwards of an hour, and finding himself unable to get his bearings, he let his vehicle drift with the tide of traffic and gave up the quest for dinner, realizing to some extent the disasters of Odysseus in his wanderings homeward. Really, renowned London lawyers must not go on losing their dinners in this heart-rending way. It behooves the symposiarch to demonstrate the locus of his feast to the coming guest by some system of fog-signals—say by anchoring an automatic siren in front of the premises, or by sending up rockets at regular intervals. Failing some such precaution as this, it would appear to be his plain duty to issue his invitations subject to the limitation of: "If Clear," or "Weather Permitting." Hungry juniors are common enough, but to have hungry circuit leaders roaming the streets of London is dreadful to contemplate.

* * *

The opinion expressed by the Lord Chief Justice of England in the recent Queen's Bench Division case of *Lewis* v. *Clay* (14 T. L. R. 149) to the effect that where a person is

tricked into signing a negotiable instrument which he did not mean to sign, he is not liable upon it, is one of the greatest importance to business people as well as the legal profession. Lord Russell thinks the bill or note void, notwithstanding that it may be all right on the face of it, the signatures genuine, and the holder a holder in due course. A case of this moment ought not to stop short of the House of Lords, if it be possible to get it there.

* * *

We learn from our English namesake of December 11th, that Mr. Montagu Crackanthorpe, Q.C., will, from the beginning of the new year "practice only before the House of Lords and Privy Council, while continuing to take 'opinion' business as before." Ahem! "Here's richness," as the immortal Squeers puts it. It is not often that we in Canada hear of a lawyer exercising the royal prerogative of choosing one's courts, and we feel that we ought to be pardoned for the following bit of Weggery apropos of the event:

> **Forgive our freedom, Montagu —**
> **Your luck is rare indeed;**
> **The King, he picks his courts to sue,**
> **While *you*, your courts to plead!**

It happened, not more than one thousand miles from Toronto, that one Elizabeth Doe, a married woman, was possessed of separate estate. Richard Roe was advancing to her $1,000 to be secured by a mortgage on her property. A justice of the peace drew up the mortgage. The mortgagee instructed the justice to see that the husband of the mortgagor released any claims he might have against the lands. The husband was therefore made the party of the third part to the mortgage. Elizabeth Doe, the mortgagor, gave the usual statutory covenants. Then the following clause was added: "And the said John Doe, the husband of the said Elizabeth Doe, hereby bars his dower in the said lands."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.

King v. *Eversfield* (1897) 2 Q.B. 475, although a case turning principally on a statute giving certain outgoing tenants a right to compensation for improvements, may nevertheless be usefully noted, inasmuch as the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) in order to determine the main question, had to place a construction on a lease whereby the premises in question were by agreement let to the tenant from September 29, 1886, at the rent of £19 12s. a year, payable quarterly on the four usual quarter days in every year. This was held to constitute a tenancy from year to year, and a provision enabling the parties to terminate the tenancy by a three months' notice on any day in the year was held not to cut it down to a quarterly tenancy, and the judgment of Day and Lawrence, J.J., to the contrary was reversed.

MUNICIPAL LAW—By-law—LICENSE ON LOCOMOTIVES USED WITHIN THE COUNTY—USER, MEANING OF.

London County Council v. *Wood* (1897) 2 Q.B. 482, turns upon the construction of a statute authorizing a municipal body to pass by-laws inter alia for granting licenses "for locomotives used within the county," and a by-law passed in pursuance thereof, whereby it was provided that "no locomotive shall be used on any highway within the county of London until an annual license for the use of the same shall have been obtained from the council by the owner thereof." The defendants owned a steam roller which was not being used in road making, but was merely passing through the country to a destination outside, and a question was stated by a magistrate whether this was a use of the locomotive within the county within the meaning of the by-law, which was answered in the affirmative by Collins and Ridley, JJ.

PARTNERSHIP—LOAN IN CONSIDERATION OF SHARE OF PROFITS—POSTPONEMENT TO OTHER CREDITORS ON BANKRUPTCY OF PARTNERSHIP.

In re Fort, (1897) 2 Q.B. 495, although turning upon the construction of the English Partnership Act (53 & 54 Vict., c. 39) may probably be nevertheless an authority in Ontario —that Act being regarded in the main as merely declaratory of the common law. The Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) determine that under the Act where one person advances money to another upon an agreement that the lender shall share in the profits of the business of the borrower, in the event of the borrower becoming bankrupt the lender is postponed to the other creditors of the borrower. The agreement in question was by parol, and an argument was made that under the Act it was only where such contracts are in writing that the postponement takes place. Such a question, however, is obviously not open under Ontario law, and the provisions of the English statute requiring such agreements to be in writing in order to protect them from being regarded as constituting the lender a partner, goes beyond the common law and cannot be considered as authoritative here.

CONSENT ORDER, ACTION TO SET ASIDE—MISTAKE—UNILATERAL MISTAKE INDUCED BY OPPOSITE PARTY—SETTING ASIDE CONSENT ORDER

Wilding v. *Sanderson*, (1897) 2 Ch. 534, was an action to set aside a consent order made in a case of *Ainsworth* v. *Wilding*. An unsuccessful motion in that action to set aside the order in question is reported (1896) 1 Ch. 673, (noted ante vol. 32, p. 471.) The Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) affirming Bryne, J., held that an order made on consent in an action may be set aside even after being entered, and partially acted on, and construed by the Court on the same grounds that an agreement inter partes can be set aside. And in the present case the order was set aside on the ground of a mistake by the plaintiff, innocently induced by the opposite party, as to the meaning of its terms, such unilateral mistake constituting an exception to the general rule of equity that a contract cannot be set aside on the ground of mistake where the mistake is unilateral.

PARTITION — OCCUPATION RENT DUE FROM CO-OWNER — SET OFF — MORTGAGEE OF CO-OWNER'S SHARE.

Hill v. *Hickin*, (1897) 2 Ch. 579, was a partition action in which a sale was ordered. One of the co-owners who had mortgaged his share was liable to account for an occupation rent, and in the distribution of the purchase money realized by the sale, the question arose whether this occupation rent could be set off pro tanto as against the mortgagee. Stirling, J., was of opinion that it could not, although it might have been set off against any part of the purchase money payable to the co-owner personally. The ground of the decision is that the liability of a co-owner to be charged with an occupation rent is not a liability which could be enforced at common law, and even if it were it is a claim personal to the co-owner, and does not create any charge or lien on his share, or against his mortgagee, who was held to be a purchaser pro tanto. The learned Judge, we see, throws doubt on the correctness of his own previous decision in *Heckles* v. *Heckles*, 2 W.N. (1892) 188.

TRUSTEE—BREACH OF TRUST—IMPROPER INVESTMENT.

In re Stuart, Smith v. *Stuart*, (1897) 2 Ch. 583, Stirling, J., held that where a trustee invested the trust funds on the faith of a valuation of a valuer appointed by a solicitor who acted for the mortgagor, and which merely stated the amount for which the property was a good security, without giving the value of the property, and the advance made was more than two-thirds of the value stated in the valuation, such an act could not be relieved against under the Judicial Trustees Act, 1893, which enables the Court to relieve trustees against breaches of trust when it appears they have "acted honestly and reasonably, and ought to be excused."

COMPANY—WINDING UP, GROUNDS FOR—"JUST AND EQUITABLE"—ULTRA VIRES—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89) S. 79—(52 VICT., C. 32, S. 4, D.)

In re Amalgamated Syndicate, (1897) 2 Ch. 600, a shareholder presented a petition to wind up a company. The company had been formed with the primary and principal object of taking over the undertakings, assets and liabilities

of three other companies, each of which had as its principal object an adventure in seats for the Diamond Jubilee. A loss had been made on this adventure, and all that remained to be done was to pay debts and distribute the surplus assets among the shareholders. The directors were contemplating embarking on other business which the Court (Williams, J.) held to be ultra vires. Under the circumstances it was held to be "just and equitable" to make the order, as the business for which the company was formed had come to an end. The rule laid down in some of the earlier cases that the Court must restrict the general words in s. 79. (52 Vict., c. 32, s. 4 (e) D.) to cases ejusdem generis with those mentioned in the previous part of the action (see per Lord Macnaghten, 12 App. Cas. 502, and *Re Spackman*, 1 McN. & G. 170) is said by Williams, J., to have been very much relaxed by more recent decisions; e.g., see *Re Brinsmead*, (1897) 1 Ch. 45.

MORTGAGE—MORTGAGOR AND MORTGAGEE—DEED—DELIVERY TO ONE OF SEVERAL GRANTEES — ESCROW — FRAUD — SOLICITOR TO BOTH PARTIES — AGENCY—REPRESENTATION BY AGENT.

London Freehold & L. Co. v. *Suffield*, (1897) 2 Ch. 608, is a case arising out of the fraud of a solicitor. The solicitor was banker and managing director of the plaintiff company. He was also one of four trustees of a settlement, and solicitor of the trust. In 1892 a sum or £9,000 of the trust funds was received by him and paid into his own account at his private bank pending re-investment. The plaintiff company afterwards on advice of the solicitor decided to take up certain mortgages outstanding on its property; by contracting a new loan at a lower rate of interest, and entrusted to the solicitor the mode of raising the money and carrying out the details of the necessary transactions to effect this object. The solicitor then caused to be prepared and executed by the company a mortgage of the company's property to the trustees of the settlement, which was delivered to the solicitor and remained in his possession, but was never registered in the company's register of mortgages, nor in the registry office of deeds. The solicitor caused an entry to be made in his books purporting

to transfer the £9,000 above referred to to the credit of the company, but the money was never actually paid over to the company, he also notified his co-trustees that the £9,000 had been invested on the security of a mortgage made by the plaintiff company. In 1895 the solicitor absconded and was adjudicated bankrupt, and it was then discovered that he had misappropriated the £9,000, and that the mortgages of the company which that £9,000 should have been used to discharge were still unpaid. The company brought the present action claiming a cancellation of the mortgage on the ground that the mortgage was delivered as an escrow, and not intended to become operative until the money purported to be secured thereby was actually advanced, and because the mortgagors never gave, and the mortgagees never got, the mortgage consideration. But the Court of Appeal (Lindley, M.R., and Ludlow and Chitty, L.JJ.) affirmed the judgment of Kekewich, J., dismissing the action, and although conceding that a deed may be validly delivered as an escrow to a party who is to take under it, and that evidence is admissible to show the character in which a solicitor acting for both parties received the deed, and the terms on which it was delivered to him, yet that the circumstances of this case precluded the deed from being regarded as delivered as an escrow, and that the mortgage was valid and binding on the company, because it was sealed, and delivered to the solicitor as a perfect deed, and was immediately operative, and because the company had by its conduct put it into the power of the solicitor, as their manager and banker, to represent to his co-mortgagees that the trust money was invested on the security of the company's property, and the company was therefore now disentitled in equity to dispute the validity of the mortgage.

DISCOVERY—PENALTY, LIABILITY TO—PRIVILEGE.

In *Derby* v. *Derbyshire* (1897) A. C. 550, the House of Lords (Lords Herschell, Watson, Shand and Davey), have affirmed the judgment of the Court of Appeal in *Re County Council of Derbyshire* v. *Derby* (1896) 2 Q. B. 297, (noted ante vol. 32, p. 669). The proceedings in question were taken

under a statute to prevent the pollution of a river, and the Act provided that a penalty might be imposed by the Court in case of disobedience of its order made thereunder. The plaintiffs in aid of their proceedings sought to examine the defendants' officers for discovery, and the defendants contended that they were not liable to discovery because the action was penal in its character by reason of the above-mentioned provision in the Statute. The House of Lords, however, agreed with the Court of Appeal that a power to impose a penalty for disobedience of the order of the Court did not in any way constitute the action a penal proceeding. As Lord Herschell in effect observes, if a power in a Court to punish for disobedience of its order constituted an action a penal action, then every action would be a penal proceeding.

COMPANY—DEBENTURES—TRUSTEE FOR DEBENTURE HOLDERS—RECEIVER—PRINCIPAL AND AGENT—LIABILITY FOR CONTRACTS OF RECEIVER.

Gosling v. *Gaskell* (1897) A. C. 575, was an appeal from the Court of Appeal in *Gaskell* v. *Gosling* (1896) 1 Q.B. 669, (noted ante vol. 32, p. 539). It may be remembered that the action was brought against the defendants, who were mortgagees in trust for the benefit of certain debenture holders of a joint stock company. The mortgage deed empowered the defendants to appoint a receiver of the property of the company, who should carry on the business of the company, and that the receiver so appointed should be the agent of the company, who alone should be liable for his acts or defaults, but the net proceeds received by him were to be applied in payment of the debentures. A receiver was appointed by the defendants who carried on the business until a winding up order was pronounced, and also after it had been pronounced, and in so carrying on the business of the company the receiver incurred a debt to the plaintiffs, which the plaintiffs sought to recover from the defendants as being the undisclosed principals of the receiver. The case was tried before the Lord Chief Justice, who gave judgment in favour of the plaintiffs, which was affirmed by Esher, M.R., and Lopes, L.J., in the Court of Appeal, Rigby, L.J., dissenting. This judgment, the House of Lords (Lords Halsbury,

L.C., and Watson, Herschell, Morris and Davey) have unanimously reversed, their lordships holding that the case was governed by *Cox* v. *Hickman*, 8 H. L. C. 268, and that until the making of the winding up order the receiver was clearly the agent of the company only, and although after the making of the winding up order the receiver ceased to be agent of the company, he did not thereby impliedly become the agent of the trustees by whom he was originally appointed. Lord Herschell in discussing the question as to who in fact became liable for goods ordered by the receiver after the winding up order, seems to come to the conclusion that it does not follow necessarily that anyone became liable on the contract, but that the receiver might possibly incur liability for breach of an implied warranty that he had authority to contract as agent.

DAMAGE—TRUSTEES—INJURY TO TRUST PROPERTY.

Owners of Steam Sand Pump Dredger v. *Greta* (1897) A. C. 596, is a decision of the House of Lords on a point which, but for a contrary judgment of the Court of Appeal, one would hardly have thought to be debatable. The action was brought by harbour trustees to recover damages occasioned to their steam pump dredger by the defendant's ship colliding therewith. The Court of Appeal held that because the plaintiffs were a public body and not entitled to make any profit out of the dredger, they could not therefore recover damages for the time they were deprived of the use of it while undergoing repairs consequent on the collision, their Lordships (Lords Halsbury, L.C., Watson, Herschell, Macnaghten and Shand) were of opinion that the plaintiffs were entitled to recover damages for the loss of the use of the dredger, but Lord Morris dissented, and agreed with the Court of Appeal.

STATUTORY RIGHT OF ACTION—JURISDICTION OF HIGH COURT—DECLARATORY JUDGMENT.

In *Barraclough* v. *Brown* (1897) A. C. 615, the House of Lords has determined that where a statute gives a right of recovery in a court of summary jurisdiction against a person

not otherwise liable, there is no jurisdiction in the High Court to make a declaratory judgment that the applicant is entitled to recover his claim in such court of summary jurisdiction.

TRADE NAME—NAME INDICATING MANUFACTURER — IMITATION OF RIVAL TRADER'S GOODS—FRAUD—INJUNCTION.

In *The Birmingham Vinegar Co.* v. *Powell*, (1897) A.C. 710, the House of Lords (Lords Halsbury, L.C., Watson, Herschell, Shand and Davey) unanimously affirmed the judgment of the Court of Appeal (1896) 2 Ch. 54, (noted ante vol. 32 p. 613) and holding that the plaintiff who had for many years manufactured a sauce according to a secret recipe, which he called and sold by the name of "Yorkshire Relish," was entitled to an injunction restraining the defendants from selling a sauce manufactured by them under that name, or using the words "Yorkshire Relish" in connection with their sauce, without clearly distinguishing it from that made by the plaintiff.

APPEAL TO HER MAJESTY IN COUNCIL IN CRIMINAL CASE, WHEN GRANTED.

In re Caren, (1897) A.C. 719, was an application for leave to appeal to the Judicial Committee of the Privy Council from a conviction in a Consular Court in a criminal case in which their Lordships reiterate the rule laid down in such cases, *In re Dillet*, (1887) 12 App. Cas. 459, viz., that "Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." No such case having been made out, the leave was refused. We may observe that the principal point relied on by the applicant was that she had been tried by a jury of five instead of twelve pursuant to the order in Council establishing the consular Court, which the applicant claimed to be invalid, but their Lordships were of the opinion that the Crown had power so to constitute the Court and to provide for the trial of criminal cases therein by juries of less than twelve.

WRIT OF SUMMONS – SERVICE OUT OF JURISDICTION – SUBSTITUTED SERVICE – DEFENDANT LEAVING JURISDICTION AFTER ISSUE OF WRIT—ORD. IX. R. 2 (ONT. RULE 146).

In *Jay* v. *Budd* (1898), 1 Q.B. 12, the majority of the Court of Appeal (Lord Halsbury, L.C., and Collins, L.J., have distinguished the cases of *Fry* v. *Moore* (1889) 23 Q.B.D. 395; and *Wilding* v. *Bean* (1891) 1 Q.B. 100,—and have held that they do not apply where a defendant goes out of the jurisdiction, not for the purpose of evading service, after the issue of the writ of summons; and in such a case, notwithstanding the defendant is actually out of the jurisdiction, substituted service of the writ for service within the jurisdiction may be ordered to be made on some person within the jurisdiction. Rigby, L.J., on the other hand was of opinion that the only case in which substitutional service of a writ for service within the jurisdiction could be ordered where defendant was actually out of the jurisdiction was where defendant had left the jurisdiction after the issue of the writ for the purpose of evading service.

Correspondence.

QUASHING SUMMARY CONVICTIONS.

To the Editor of the Canada Law Journal.

Having noticed a letter of "Subscriber" in your last volume p. 658, on this subject I respectfully suggest this as a remedy. That in place of having recourse to the certiorari and quashing the conviction, the complainant or defendant ought, upon depositing the fine and costs and the sum of ten dollars, to have the right thereupon to give a verbal notice of appeal. or within ten days an appeal in writing for a motion to come up before the Local Judge of the High Court for the county. The notice of motion might be served by registered letter and if given while both parties were still present to be ted by the Justice in the proceedings. This course ld give an inexpensive and speedy mode of relief, and

would make a cheap remedy and would save the costs of recognizances, etc. There might also be given an appeal to the Divisional Court from the Local Judge. I would also suggest an amendment to the Criminal Code to permit either party before or after the Justice had intimated what his finding would be to ask the Justice to reserve his decision and send the proceedings to the Local Judge of the High Court for the county, in order that such Judge might review the proceedings and say what the finding should be, and that the finding of the Justice should conform thereto, and that in order to obtain such review the party asking it should deposit the costs and five dollars and postage on the proceedings both ways. Either party having the right to notify the Local Judge of his wish to be heard on the review, and with the privilege to the said Judge to ask either or both parties or the County Attorney to appear before him to be heard generally or on some point to be stated. Also that no conviction or return of conviction, for publication should be made until after the report of the Local Judge, and the result of the appeal therefrom. The latter to have the right to award five dollars costs to the party successful before him, and either party to have a right of appeal from him to a Divisional Court. The effect would be that no conviction would be recorded against a man's good name unless some reasonable ground existed therefor. As it is now, once a conviction has been made, no matter how unreasonable, and although afterwards quashed, the justice must return it for publication, and a man's probably good name is tarnished. The advantage of this is that everyone would have a cheap and speedy remedy against an improper conviction. I only make the suggestion. The details could easily be worked out by the lawmakers.

ANOTHER SUBSCRIBER.

REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

From Official Arbitrator.] [Jan. 11.

IN RE RODEN AND CITY OF TORONTO.

Statute—Construction—Amendment—Retroactive effect—Limitation of actions, 54 Vict., c. 42, s. 16 (O).

Unless there is a clear declaration in the Act itself, to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights. 54 Vict., c. 42, s. 16 (O), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act. Judgment of the Official Arbitrator affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *H. M. Mowat*, for respondent.

From Robertson, J.] LUFFMAN *v.* LUFFMAN. [Jan. 11.

Ship—Sale—Unregistered lien—Notice—Merchants' Shipping Act, 1894.

While under s. 57 of the Merchants' Shipping Act, 1894, 57-58 Vict., c. 60 (Imp.) unregistered equitable interests can be enforced as between the parties immediately affected, the effect of section 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he knows of them. Judgment of ROBERTSON, J., reversed.

W. Nesbitt, for appellant. *C. J. Holman.* for respondent.

From Drainage Referee.] STEPHENS *v.* TOWNSHIP OF MOORE. [Jan. 11.

Drainage—Repairs—"Person injuriously affected"—Mandamus — Drainage Act, 1894, s. 73.

Under s. 73 of the Drainage Act, 1894, (57 Vict., c. 56 (O.)) a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and is entitled to a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can show that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property. Judgment of the Drainage Referee reversed.

M. Wilson, Q.C., for appellant. *Aylesworth*, Q.C., and *Lister*, Q.C., for respondent.

From Boyd, C.] DAW *v.* ACKERILL. [Jan. 11.

Church—Incumbent's salary- Liability of churchwardens.

The churchwardens of an Anglican congregation which had adopted the free pew system, and in which the only revenue is derived from the voluntary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose. Judgment of BOYD, C., 28 O.R. 452 ; 33 C.L.J. 73, affirmed.

Clute, Q.C., for appellant. *S. Masson*, for respondents.

From Divl. Court] KERVIN *v.* CANADIAN COTTON MILLS CO. [Jan. 11.

Negligence—Evidence—Master and servant.

This was an appeal by the defendants from the judgment of a Divisional Court reported 28 O. R. 73, and was argued before BURTON, C.J.O., OSLER and MACLENNAN, J.J.A., and FALCONBRIDGE, J., on the 10th of June, 1897.

OSLER, J.A., and FALCONBRIDGE, J., were of opinion, agreeing with the majority in the Divisional Court, that there was evidence from which it might properly be inferred that the accident was caused by the negligence of the defendants.

BURTON, C.J.O., and MACLENNAN, J.A., were of opinion that the evidence was equally consistent with the theory that the deceased's own carelessness caused his death.

Appeal was dismissed with costs.

McCarthy, Q.C., and *R. A. Pringle*, for appellants. *Aylesworth*, Q.C., for respondent.

From Rose, J.] HESSELBACHER *v.* BALLANTYNE. [Jan. 11.

Sale of goods—Contract—Loss of goods.

This was an appeal by the plaintiff from the judgment of Rose, J., reported 28 O.R. 182 ; 33 C.L.J. 73, and was argued before BURTON, C.J.O., OSLER and MACLENNAN, JJ.A., on the 17th and 20th of September, 1897.

Appeal dismissed with costs, the court holding that, on the evidence, the plaintiff had accepted and taken possession of the logs, and not dealing with the point upon which the case turned in the court below.

Aylesworth, Q.C., for appellant. *W. M. Douglas*, for respondent.

From Boyd, C.] MAIL PRINTING COMPANY *v.* CLARKSON. [Jan. 11.

Assignments and preferences—Contingent claim—Advertising contract.

Where an estate is being administered under the Assignments and Preferences Act, R.S.O. ch. 124, claims depending upon a contingency cannot rank, but only debts strictly so called. An advertising contract gave the advertiser in consideration of the sum of $1,000 the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month and at the

expiration of twelve months, whether the space had been used or not, to pay $1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to R.S.O. c. 124,

Held, reversing the judgment of BOYD, C., 28 O.R. 326; 33 C.L.J. 289, that the $1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank. *Grant* v. *West*, 23 A. R. 533, applied.

Thomson, Q.C., for appellant. *C. J. Holman*, for respondents.

From Street, J.] CERRI *v.* ANCIENT ORDER OF FORESTERS. [Jan. 11.

Benevolent society—Life insurance—Mistake as to age.

S. 6 of the Ontario Insurance Amendment Act, 1889, 52 Vict., c. 32 (O.), does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted a member and given an endowment certificate, it was held that the beneficiary named therein could not recover.

Judgment of STREET, J., 28 O.R. 111, reversed, MACLENNAN, J.A., dissenting.

Aylesworth, Q.C., and *McWatt*, for appellants. *G. G. Mills*, for respondent.

From Robertson, J.] COLL *v.* TORONTO R. W. CO. [Jan. 11.

Master and servant—Damages—Tort—Wrongful act of servant—Scope of employment.

The master is not liable for the wrongful act of the servant, though done during the course of his employment and intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority and is one which the master himself could not legally do.

The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the car, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger. Judgment of ROBERTSON, J., reversed.

J. Bicknell, for appellants. *Aylesworth*, Q.C., and *L. V. McBrady*, for respondent.

From Rose, J.] [Jan. 11.

RE CANADIAN PACIFIC R.W. CO., AND COUNTY AND TOWNSHIP OF YORK.

Railways—Highways—Crossings—Maintenance of gates—Apportionment of cost—Constitutional law—Railway Committee—Railway Act, 1888, 51 Vict., c. 29 (D).

The Railway Committee of the Privy Council, on the application of the City of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway run-

ning from the City of Toronto into the Township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in certain proportions by the railway company, the city, the township, and the county.

Held, per BURTON, C.J.O., and MACLENNAN, J.A., that, assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county.

Per OSLER, J.A., that the legislation was intra vires, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee.

Per MEREDITH, J., that the legislation was intra vires, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question.

Per Curiam, that the decision of the Railway Committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the court. In the result the judgment of ROSE, J., 27 O.R. 559, was allowed as to the County of York, and dismissed as to the Township of York.

Aylesworth, Q.C., for the Township of York. *C. C. Robinson*, for the County of York. *Robinson*, Q.C., and *A. MacMurchy*, for the Canadian Pacific Railway Company. *J. R. Cartwright*, Q.C., for the Attorney-General for Ontario.

From Falconbridge.] FAWKES *v.* GRIFFIN. [Jan. 11.

Receiver—Money in hands of—Payment into Court—Default—Attachment—Order for—Motion to rescind—Delay—Irregularities—Specific order for payment—Punishment—R.S.O. 1887, c. 67, ss. 6, 11—Understanding between receiver and solicitor—Claim of receiver upon money in his hands.

On June 27. 1895, an order was made in this action by consent, appointing the defendant's solicitor receiver in the action until Sept. 3, 1895, to collect the rents of the premises in question, and directing that he should pass his accounts before the Master, and pay into court the balance which might from time to time be certified to be in his hands. On August 28, 1895, the plaintiff's solicitor wrote to the receiver, asking that the matter might remain as it was until October. The receiver swore that he thereupon called on the plaintiff's solicitor, and an understanding was arrived at between them by which he was to continue to act as receiver until a motion should be made to dissolve or continue the injunction, and that all moneys which he collected as receiver were to remain in his hands until the disposition of the action, when he undertook to pay them over, and on this understanding he consented to allow the motion to continue the injunction to stand sine die. In Oct., 1895, the receiver passed his accounts, and on the 22nd of that month the Master certified that $266.64 was in the receiver's hands to be paid into court as directed

by the order. The receiver not having paid the money into court, the plaintiff's solicitor, on Nov. 12, 1895, wrote to him requesting him to do so; and the receiver answered on the same day saying that, according to any orders or reports that had been made, he had not ascertained any date within which the money should have been paid into court; that he was waiting a specific order for that purpose, and as soon as such order was made, or at any time, he was prepared to pay into court the money he had received. On Nov. 27, 1895, notice of motion was served by the plaintiff for an order to commit the receiver to gaol for his contempt in not paying into court the sum found due, and on Dec. 10, 1895, no one appearing to oppose the motion, an order was made by Boyd, C., requiring the receiver within ten days to pay the amount into court, and that in default of his doing so a writ of attachment should issue, etc., etc. On Jan. 13, 1896, notice of motion was given by the receiver, by the special leave of Boyd, C., for an order setting aside the last mentioned order, on the ground of the understanding above mentioned between the receiver and the plaintiff's solicitor, and an explanation of the failure of the former to oppose the motion to commit. The understanding was denied by the plaintiff's solicitor. The receiver also swore that the plaintiff and defendant were both indebted to him in large amounts, and he claimed a lien on the money in his hands for costs, and a right of set-off. Upon this motion an order was made by Falconbridge, J., on March 3, 1896, extending the time for payment into court by the receiver until April 30 then next, and directing that in default thereof the motion should be dismissed with costs.

Held, upon appeal, that no sufficient case had been made out for interfering with the orders of BOYD, C., and FALCONBRIDGE, J. There was a great delay in moving, but it was to be assumed in favour of the receiver that a sufficient order to extend the time for doing so was made, and that Rule 1454 of January, 1896, amending Con. Rule 536, as to rescission of ex parte orders, applied, though it did not come into force until after the order of BOYD, C., was made. Neither in the affidavits filed nor in the notice of motion to rescind the first order were any objections taken to the regularity of the proceedings, and the case was not in which the Court should be astute to discover them, or permit them to be raised for the first time on the argument of the appeal: *Treherne* v. *Dale*, 27 Ch. D. 366.

That an attachment lies against a receiver as an officer of the Court for his default in compliance with the order to pay into Court the money found to be in his hands sufficiently appears from *In re Wray*, 36 Ch. D. 138, *In re Gent*, 40 Ch. D. 190, and *In re Freston*, 11 Q.B.D. 553, and other cases applied and followed in *Pritchard* v. *Pritchard*, 18 O.R. 173. The powers of the Court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim inter partes, but for punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R.S.O., 1887, c. 67, are inapplicable. It cannot be said that an understanding between the receiver and the solicitor of one of the parties ought to be accepted as an excuse for non-compliance with the order, more especially when the authority to waive the order is not admitted or is denied by the parties or either of them. And while there may be cases such as *In re Gent*, 40 Ch. D. 190, where the

Court, in case of the receiver, has relieved him from paying in the whole of a very large sum found to be in his hands, recognizing the fact that he may be entitled to a share thereof and to remuneration, none is to be found where he has been permitted to discharge himself by setting up claims which, had they been put forward in the first instance, would in all probability have prevented his appointment: *Re Bell's Estate*, L.R. 9 Eq. 172. Besides, the receiver's letter of Nov. 12th, 1895, furnished a complete answer to his application for relief, showing as it did, especially when taken in connection with the fact that he was not prepared on Dec. 10th to set up the grounds now relied on, that these grounds were a mere afterthought.

Semble, that a specific order to pay over the balance is the proper course in the first instance.

Judgment of FALCONBRIDGE, J., affirmed.

W. R. Smyth, for appellant. *Bradford*, for respondent.

HIGH COURT OF JUSTICE.

Robertson, J.] SAWYER *v.* PARKIN. [Oct. 26, 1897.

Division Courts—Jurisdiction—Agreement for sale of machine—Ascertainment of amount claimed.

Under a written agreement for the sale of a machine, signed by the defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved security, for $125, the price thereof, and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by the plaintiffs f.o.b cars addressed to the defendant to an outside railway station, was received by him and shortly after returned to plaintiffs.

Held, that there was no jurisdiction in the Division Court to entertain an action for the price of the machine. as the amount was not "ascertained by the signature of the defendant" under s. 70, s.-s. (O) of R.S.O. (1887) c. 51, for in addition to proof of the signature, evidence was necessary to show that the terms of the agreement had been performed by the plaintiffs.

Kirwin Martin, for plaintiffs. *D. L. Walsh*, for defendant.

Boyd, C.] HUYCK *v.* WILSON. [Jan. 13.

Arbitration—Action to enforce award—Publication—Time for moving against award—Interest—Costs of arbitration—Taxation—Judgment—Writ of summons—Special indorsements.

Action upon an award. Appeal by the plaintiff from an order of the local Judge at Picton setting aside his own ex parte order allowing the plaintiff to enter judgment upon a writ of summons specially indorsed in default of appearance, and setting aside the judgment entered pursuant thereto and execution issued upon such judgment.

Held, that publication of an award has one meaning when it relates to the time within which the parties can move against the award, and that was considered in *Redick* v. *Skelton*, 18 O.R. 100, but another meaning when it relates to the completion of the award so far as the arbitration is concerned, in which case it is satisfied by the execution of the award in the presence of a witness or by any other act showing the final mind of the arbitrator, upon which he becomes functus officio: *Brown* v. *Vawser*, 4 East 584; *Brooke* v. *Mitchell*, 6 M. & W. 473.

The indorsement of the writ of summons in this case stated that the award was made and published, and it must be taken to be final as far as the arbitration is concerned. The award being thus completed, an action may be brought upon it forthwith, though it may be open for the defendant, if dissatisfied, to move against it within the usual limits of the time allowed by the practice after publication to the parties. The two proceedings to set aside the award, and to enforce it by action, may go on concurrently. The weight of authority is against any suspension of the right to enforce the award pending the period within which it may be summarily moved against. *Moore* v. *Buckner*, 28 Gr. 606, is not in accord with the other cases: See Redman on Awards, 2nd ed., p. 284, and cases there cited; *Doe* v. *Amey*, 8 M. & W. 565; *Plumner* v. *Mitchell*, 48 Me. 184.

In this case there was no objection to the amount awarded except as to the amounts claimed for interest and costs. Interest would not run if no notice of the award was given to the defendant; and the costs of the arbitration did not form a liquidated sum, as they were not taxed. But as to $660, the sum awarded, and $40, the amount paid to the arbitrators, the judgment should stand, under Rule 575.

Order below modified by allowing the judgment and execution to stand for $700, and letting the defendant in to defend as to the residue, unless the plaintiff abandon it. This order to be without prejudice to any motion by the defendant against the award.

J. H. Moss, for plaintiff. *Swabey*, for defendant.

Armour, C.J., Street, J.] ALEXANDER *v.* IRONDALE, R.W. CO. [Jan. 17.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

Held, reversing the decision of ROSE, J., ante p. 37, that in this case the subpœna for the examination of the defendants' president, as an officer of a corporation, for discovery should not be set aside quoad the books and documents which it called upon him to produce, for the affidavits showed that the accounts of the defendants were kept in the books of the president; and the practice of setting aside a subpœna, as laid down in *Steele* v. *Savory*, (1891) W. N. 195, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner.

A. C. McMaster, for plaintiff. *W. H. Blake*, for defendants.

Armour, C. J., Street, J.] IN RE RIBBLE *v.* ALDWELL. [Jan. 17.

Mechanics' liens—Enforcements—Forum—County Court Judge.

All actions and proceedings to enforce mechanics' liens must be brought and taken in the High Court of Justice under the procedure enacted by 59 Vict., c. 35, as amended by 60 Vict., c. 24. Although by ss. 31 and 32 of the former Act a County Court Judge has complete jurisdiction in such an action or proceeding, in the High Court, yet if the proceedings are intituled in a County Court he has no jurisdiction.

R. S. Appelbe, for plaintiffs. G. C. Campbell, for defendant.

Armour, C.J., Street, J.] IN RE LOTT *v.* CAMERON. [Jan. 19.

Division Court—Action for balance of unsettled account—Liquidated claim—Prohibition.

Decision of MEREDITH, C.J., in Chambers, ante 33, affirmed on appeal.

C. J. Holman, for the defendant. *J. H. Moss*, for the plaintiff.

Armour, C.J., Street, J.] FOLEY *v.* EAST FLAMBOROUGH. [Jan. 29.

Municipal corporations—Highway—Accident—Runaway horses—Control—"Repair" of highway.

An appeal by the plaintiffs, the widow and child of a man named Foley who was killed by being thrown from a wagon on the centre road in the township of East Flamborough, from the judgment of Boyd, C., at Hamilton, dismissing with costs an action brought against the township corporation for damages for the death, which the plaintiffs charged was due to the road being out of repair, there being an obstruction in it in the shape of a stump. Foley was being driven by a friend of his, one Sullivan, in the latter's wagon, to which was attached a pair of spirited horses. The action was dismissed because it was found that Sullivan was drunk, and Foley, if sober, must have known it, and this condition contributed to the accident. The trial Judge not having found specifically whether the road was or was not in a reasonable state of repair, the Court now found upon the evidence that at the time of the accident the road was in a reasonable state of repair, having regard to the requirements of the public using the road in the ordinary way.

The word "repair" as used in the Municipal Act, is a relative term. If the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

But for *Sherwood* v. *Hamilton*, 37 U.C.R. 410, it should be held that in this case the running away of the horses and their ceasing to be under control was the proximate cause of the injury. Assuming the facts to be that the driver, in spite of ordinary care on his part, lost control of his horses, and

that they running away, the injury was caused by their running the vehicle against the stump in the highway, the plaintiffs could not recover, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel.

Appeal dismissed with costs.

Lynch-Staunton, for plaintiffs. *W. T. Evans*, for defendants.

Armour, C.J., Street, J.] FITZGERALD *v.* MOLSONS BANK. [Jan. 29.

Municipal corporation—Borrowing powers—Current expenditure—Inquiry by lenders—Repayment of money lent—Action to restrain.

An appeal by the plaintiffs from the judgment of Rose, J., at the trial at Ottawa, dismissing the action, which was brought by certain ratepayers of the Village of Hintonburgh against the bank, the village corporation, and the sheriff of the county of Carleton, to restrain the collection and enforcement of a judgment for $6,000 recovered by the bank against the village corporation, upon the ground that the corporation had no power to borrow from the bank the money for which judgment was recovered. The borrowing of $7,000 from the bank was authorized by by-laws of the village corporation passed in 1895. The amount borrowed was expended in the repair and alteration of certain roads, and in diverting the course of a certain stream within the village limits. These works were within the general powers of the corporation, but no provision had been made for the outlay in the estimates. The by-laws authorized the borrowing of not more than $7,000 to meet current expenditure until the taxes could be collected. The by-law which authorized the levying of the rates for 1895 specified the amounts to be levied for each separate purpose, and these works were not specified. The whole amount authorized to be levied was only $5,179.45. In 1897, after this action had been begun, a by-law was approved by the vote of the ratepayers, and passed, which authorized the issue of debentures for $8,000, reciting the expenditure upon the works referred to.

Held, that, upon the proper construction of s. 413 of the Municipal Act of 1892, as amended by the Act of 1893, s. 10, a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing. It was admitted, however, that the money borrowed from the bank was expended by the council upon works within its jurisdiction upon which money lawfully obtained for the purposes of the council might have lawfully been expended; the by-law of 1897 was also admitted, and that the council had issued debentures and raised money upon them, and were willing to pay back to the bank the money borrowed, and were only restrained from doing so by the proceedings in this action. If the plaintiffs, upon the passing of this by-law, had withdrawn their opposition to the payment of the bank's claim, they would have been entitled to their costs, because they were right up to that point; but they insisted that the council had no right to use the money raised upon these debentures in

repaying the bank, because the by-law did not specifically state that the money was to be paid to the bank. There is nothing in the Municipal Act which prevents a council, with the approval of the ratepayers, from raising money for the repayment of such a debt as this. A municipality, having so borrowed money and expended it for the benefit of the ratepayers, is not to be restrained from being honest enough to pay it back.

O'Meara, for the plaintiffs. *Aylesworth*, Q.C., for the defendants, the Molsons Bank. *W. R. Smyth*, for the defendant Sweetland, the sheriff.

FIRST DIVISION COURT, COUNTY OF ONTARIO.

Denton, Acting Co. J.] ONTARIO LADIES COLLEGE *v.* HODGIN. [Jan. 7.

Division Court—Jurisdiction where cause of action arose—57 Vict., c. 23, s. 12—60 Vict., c. 14, s. 12.

The defendant, residing in the Province of Quebec, subscribed for $100 stock in the plaintiff company. A call was made on the stock payable at the Western Bank in the town of Whitby, Ontario, and the defendant having made default in payment, this action was brought for the amount of the call.

Held, that the cause of action arose partly within the jurisdiction, and that where the claim is for a sum within the jurisdiction the action lies even though the defendant resides out of the jurisdiction.

J. B. Dow, for plaintiff. *Farewell*, Q.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

(Before McDonald, C.J., Ritchie, Townshend, JJ., and Graham, E.J.)

THE QUEEN *v.* HALIFAX ELECTRIC TRAMWAY CO.

Lord's Day observance—Provincial Act amending provisions of old provincial criminal law held ultra vires.

Prior to 1867 c. 159 of the Revised Statutes of Nova Scotia (3rd series) was part of the criminal law of the province.

By the British North America Act the criminal law was placed within the exclusive legislative authority of the Parliament of Canada, which authority was exercised in respect of c. 159 by the repeal of two of its sections.

Sec. 2, which was not repealed, was as follows: "Any person who shall be convicted before a justice of the peace etc., of servile labor, works of necessity and mercy excepted, on the Lord's Day shall for every offence forfeit, etc."

By the Provincial Acts of 1891, c. 32, it was sought to amend this provision of c. 159 by enacting that "a body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act and is liable," etc.

Held, (allowing a writ of prohibition to restrain the stipendiary of the

City of Halifax from proceeding to try and convict the defendant company for a violation of the latter Act) that c. 159 of the Revised Statutes (3rd series) being part of the Criminal Law of Canada, the Legislature of Nova Scotia had no power to alter or amend any of its provisions and that any legislation, such as c. 32 of the Acts of 1891, purporting to have that effect, was ultra vires.

Held, nevertheless, that the Provincial Legislature would have power to deal with the subject by legislation coming under the head of property and civil rights.

McDONALD, C.J., dissented.

[HALIFAX, Jan. 11, 1898.

This was an application for a writ of prohibition to restrain the Stipendiary Magistrate of Halifax from proceeding to adjudicate upon a complaint made before him against the defendant company, charging them with a violation of R.S. (third series) c. 159, in that the company directed and permitted a motor man, one of their servants, to perform servile labour in the City of Halifax on Sunday, by operating a tram car owned by the company upon and along the streets of the said city, and by carrying passengers in the car and performing the duties of a motorman in connection therewith, such labour being servile labour within the meaning of the said statute, as amended by c. 32 of the Acts of Nova Scotia, 1891, and not being a work of necessity or mercy within the meaning of such statute.

Hon. J. W. Longley, Q.C., *Attorney-General*, for the Crown.

W. H. Covert, for the defendant company.

GRAHAM, E.J.: Before the British North America Act was passed we had in the Revised Statutes (3rd series) under the part relating to the Criminal Law and the Administration of Criminal Justice, a chapter entitled "Of Offences against Religion." Some of the provisions were repealed by the Parliament of Canada, having found a place in the body of criminal law. Three sections were not repealed or re-enacted. S. 2 is as follows: "Any person who shall be convicted before a justice of the peace of shooting, gambling or sporting, of frequenting tippling houses or of servile labour, works of necessity and mercy excepted, on the Lord's Day, shall for every offence forfeit not less than one, nor more than eight dollars, and in default of payment shall be committed to jail for a term of not less than twelve hours nor more than four days."

There has been legislation purporting to be amendments of this provision passed by the Provincial Legislature, viz.: 1889, c. 5; 1890, c. 22; 1891, c. 32. And by the last of these a natural person or body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act, and is liable to penalty, etc.

The first question, I think, is whether the second section relates to a subject coming within "property and civil rights" under s. 92, or "the criminal law" under s. 91 of the British North America Act. Is it aimed at a public wrong, or is it a "shall not" in respect to civil rights? Of course the imposition of a penalty means little. Both Legislatures may impose penalties for the enforcement of their laws by the express terms of the Act. The applicants for the writ of prohibition contend that the subject of this legislation could

alone be dealt with by the Dominion Parliament and that the original Act could not now, and the amendments as well could not be passed by the Provincial Legislature. Hence that the amendments under which the information is laid are ultra vires.

Statutes of this character are common in the United States, and they are held to deal with Sunday as a civil institution, and to be a proper exercise of the police power of the State to promote the mental, moral, and physical well-being of the people by providing that they shall rest a seventh part of their time from labour, and at regular intervals. I only refer to these laws to ascertain, if possible, what is the proper head to put such statutes under in this country.

Blackstone, vol. 4. p. 63, not only treats of Sunday as a civil institution, but, as would be expected, in England, also from the standpoint of religion or morals. He has a chapter "Of Offences against God and Religion," and, under it, a head, "Profanation of the Lord's Day, vulgarly but improperly called Sabbath-breaking." There he refers to early English statutes, the parent of some of the American statutes as well as our own.

Many text writers follow this classification. In Bishop on Criminal Law, vol. 2, sec. 951, it is even suggested that the violation of the Lord's Day was indictable at common law. In 1 Chit. Crim. Law 20, there is a form of indictment at common law against a Sabbath breaker and profaner of the Lord's Day in keeping open shop. But it proceeds on the ground of nuisance, and would not cover the offences mentioned in this Act. In the Criminal Code of Canada there is a title, "Offences against religion, morals, and public convenience." Of course it is difficult to draw the line in respect to legislation relating to civil rights and relating to public wrongs But if it can be shown to be dealing with public wrongs, then it is removed from the head of civil rights.

It seems to me that there is authority on the point—a dictum in *Russell* v. *The Queen*, 7 App. Cas. 829. I venture to refer to it, although it appears that courts of first instance have generally had the misfortune to misunderstand any citations that they have ever made from that case. "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, 'Property and Civil Rights.' What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but relating to public order and safety. Upon the same considerations the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property to be criminal and wrongful." This is the dictum: "Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to animals though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so

regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs, rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

In *Regina* v. *Wason*, 17 Ont. App. 221, a provincial statute prohibiting under a penalty any person from selling adulterated milk to owners of a cheese or butter factory was held to be intra vires. But Street, J., whose opinion was upheld in the Court of Appeal, said: "Is it an Act constituting a new crime for the purpose of punishing that crime in the interests of public morality, or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law. If under the latter, I think it is good as an exercise of rights conferred on the province by sec. 92 of the B. N. A. Act." This observation was approved of in the Court of Appeal.

Testing this section by it I think it falls within the criminal law. Possibly the Provincial Legislature might approach it by enacting a law about masters and servants, and another about winners and losers in gambling, giving the one as against the other a rest on one day in the week, and so on, and thus bring the legislation under the head of civil rights, as the statute about vendors and vendees of milk was brought. But this provision is not passed about such rights at all; it is dealing with things which the legislature regarded as injurious to the public—not the rights of individuals inter se, but the right of the community not to have its citizens demoralized, whether they are those who engage in shooting, gambling, sporting, tippling, or working on Sunday, or those who are obliged to witness these things. One private citizen has no more interest than another in seeing it enforced. It is aiming at something analogous to public nuisances, and concerns the public.

There is another head to be looked at. If this provision was passed in the interest of the public no reason has been suggested why it is not as suitable or as applicable to the condition of things in other provinces as in Nova Scotia. It would not, therefore, be considered a "matter of a merely local or private nature in the province." The field has been occupied, if this is criminal law in so far as this Province is concerned, and there is no reason for applying provincial Legislation as a temporary expedient, because of any particular local iniquity under the recent doctrine of the Judicial Committee of the Privy Council.

Coming to the amendments, I suppose the Province might pass legislation in regard to this matter, and perhaps secure the same end under the head "property and civil rights" or some other head. But it appears to me that the Act, 1891, c. 32, is not an attempt to do this. It is a bona fide attempt to amend by adding sections to an Act which I have just endeavored to show is a part of the criminal law. The first section expressly says so. Moreover the person who offends by employing, hiring or procuring his employee to

perform servile labour is declared "guilty of performing servile labour on Sunday within the meaning of the second section of this Act," i.e., the principal Act. It is an attempt to deal with the criminal law—to make an offence equal to a crime that the Parliament of Canada alone could create.

In my opinion the prohibition ought to issue to prevent the prosecutor from proceeding under these supposed amendments.

RITCHIE, J.: Previous to 1867, c. 159 of the Revised Statutes (3rd series) was part of the criminal law of Nova Scotia. The whole of that series is contained in one Act, the different chapters being grouped together under specific divisions, or parts, and titles, which are, I think, part of the Act. (See p. 1 and s. 1 of c. 170, at p. 680). In this Act or revision c. 159 is placed with all the other criminal statutes then in force in part 4, which is entitled "Of the Criminal Law, and the Administration of Criminal Justice," and in the subdivision or title xli., which is entitled "Of Offences against the Government."

By the British North America Act the criminal law of this province was placed within the exclusive legislative authority of the Parliament of Canada, and that authority was exercised in respect of this chapter in 1869, when the Parliament of Canada repealed two of its sections. Revised Statutes of Nova Scotia (3rd series), c. 159, being part of the criminal law, the local legislature of Nova Scotia had, in my opinion, no power to alter or amend any of its sections, and any legislation purporting to have that effect is ultra vires the Local Legislature. I wish to be distinctly understood as giving no opinion as to whether the Local Legislature could or could not, by any legislation, prevent the performance of servile or other labour on Sunday, but I think it cannot be done in the way attempted—that is, by trying to amend the criminal law. The stipendiary magistrate for the City of Halifax should be prohibited from convicting the Halifax Electric Tramway Company, Limited, for any breach of the acts of the Local Legislature of Nova Scotia, purporting to amend c. 159 of the Revised Statutes of Nova Scotia (3rd series), or any act in amendment thereof.

TOWNSHEND, J., concurred.

MCDONALD, C.J., after citing B.N.A. Act, s. 129, referred to the sections mentioned in the information, and held that they were not ultra vires the legislative powers of the local Legislature. He then proceeds as follows:

The ground was not taken on the argument that c. 159 was ultra vires, nor can I see how such an argument could prevail, if my view is correct, that the statute, by reason of the legislation I have mentioned is a police or municipal law of the Province and nothing more. It is amendable both as to procedure and the imposition of penalties by the Provincial Legislature. I have been unable to perceive upon what principle the amending Acts I have referred to can be said to be ultra vires the authority of the Provincial Legislature. It is the duty of that Legislature to enforce all the laws of the Province, c. 159 included, and to provide and regulate the machinery and procedure by which that can be done, for without rules of procedure applicable to the courts whose function it is to deal with the question involved, the law itself may be incapable of enforcement. The right of the Provincial Legislature to make such provisions, and to impose adequate punishment by fine or imprisonment under

laws by which they had power to enact has long been settled by the highest authority. I have said that the second section of the amending Act of 1889 was an unnecessary precaution because the Interpretation Act in the third series of the Revised Statutes containing c. 159, contains the same provision in almost identical words. "Persons may include bodies politic and corporate as well as individuals." See also *Pharmaceutical Society of London v. L. & P. Supply Association*, 5 App. Cases, at p. 561.

I have endeavoured to show that the Stipendiary Magistrate of Halifax has jurisdiction to enquire into and adjudicate upon a charge of an alleged violation of the principal Act, and that the amendments mentioned do not affect that jurisdiction.

The charge is that this defendant corporation procured and hired persons to do servile work for them and in their interests on the Lord's Day. I think the Stipendiary Magistrate of Halifax has jurisdiction to adjudicate upon that charge, and that, consequently, this application should be refused with costs.

I am not sorry that I feel obliged to come to this conclusion. The Parliament of Canada has made no provision with a view to enforce abstinence from ordinary labour and occupation on the Sabbath, leaving the subject in case of Nova Scotia to be dealt with by the Local Legislature, and I should be sorry to see the sanction which our statute gives to the sacredness of the Sabbath withdrawn.

Prohibition granted.

McDonald, C.J.] BAULD *v.* ROSS. [Dec. 23, 1897.

Registry law—Second deed—Last grantee having notice—Assent.

In 1891 M. conveyed certain lands to P., by deed not recorded. In 1892 M. conveyed by deed the same property to C., P. having knowledge of and assenting to the execution of the deed to C. The second deed was recorded. Subsequently, the plaintiffs recovered judgment against M. and recorded the same. The Registry Act R.S.N.S. 5th series, c. 84, s. 21, provides that a judgment duly recorded shall bind the lands of the party against whom the judgment is recovered as effectually as a mortgage, and s. 18 provides that "deeds and mortgages of lands duly executed, but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such lands." The plaintiffs brought this action claiming a declaration that the deed from M. to C. was void as against plaintiffs, and that the legal title was in P., and that the lands were, under the Registry Act, bound by the judgment of plaintiffs. The action was tried before the Chief Justice at Baddeck, who

Held, that under the Registry Act and the facts in evidence the plaintiff's judgment did not become a lien on the property conveyed to C., and that the law as well as the equities were in favor of the defendants.

D. McNeil, for plaintiffs. *J. A. McDonald*, for defendants.

Full Court.] HOLLOWAY *v.* LINDBERG. [Jan. 11.

Master and servant—Term of hiring—Dismissal without notice—Evidence—Acceptance of employment with person to whom business is transferred.

In an action by plaintiff against defendant for wrongful dismissal without due notice the trial Judge found in defendant's favor on the ground that a weekly had been substituted for a yearly hiring. There was a direct conflict of evidence between the parties on this point.

Held, that the Court should not interfere with the conclusion of the trial Judge, although members of the Court were disposed to think that had the matter come before them they would have found differently.

Assuming that plaintiff was working for defendant under a weekly hiring when the business of defendant was taken over by the H. B. Co., with whom plaintiff continued,

Held, that the trial Judge was right in holding that the relationship between plaintiff and defendant came to an end, and that plaintiff then entered into the employment of the company.

Per TOWNSHEND, J., that the case was not that of a servant unjustly dismissed, but of a servant accepting employment in the same business upon its transfer to other persons, with full knowledge and acquiescence, and without objection to the new arrangement.

E. P. Allison, for appellant. *C. P. Fullerton*, for respondent.

McDonald, C.J., Ritchie, J., Townshend, J., Graham, E.J. } BIGELOW *v.* DOHERTY. [Jan. 11.

Setting aside judgment in default of plea—Affidavit need not disclose merits—Discretion of Judges—Defence sent by mail—Non-compliance rule—Costs.

By agreement between solicitors defendant was allowed further time for putting in his defence. Before the expiration of the time, and by the same mail, copies of the defence were sent to plaintiff's solicitor and the Clerk of the Court. The latter was shown to have been received in time, and was placed on file, and there was no explicit denial of the receipt of the former. Plaintiff's solicitor having entered judgment for default of plea, the Judge of the County Court on application to him for that purpose, showing the facts and on the usual affidavit of "a good defence on the merits," set aside the judgment with costs, giving leave to defendant to file and deliver his defence.

Held, affirming the judgment with costs that the practice requiring a party seeking to set aside a judgment for default of plea to disclose merits has been superseded by O. 27, R. 14, under which a judgment so entered may be set aside by the court of a judge upon such terms as to costs or otherwise, as such court or judge may think fit, and that in view of the terms of the rule, and the repeal of the former practice, it is not now necessary for the defendant to disclose merits unless the judge to whom the application is made requires it.

Per GRAHAM, E.J., that the case was eminently one in which the judge was justified in exercising his discretion by granting the application, and

Quære whether, although the service was not effected in the mode prescribed, it should not, under the non-compliance rule, be held to be sufficient.

H. V. Bigelow, for appellant. *McDonald* and *Ives* for respondent.

Full Court.] MUNRO *v.* QUIGLEY. [Jan. 11.

Libel—Fair criticism of public official does not justify charge of corrupt motives.

Defendant, one of the councillors of the town of Westville, published a letter commenting upon the conduct of plaintiff, the mayor of the town, alleging that the plaintiff took advantage of some of the employees of the town by withholding the money due them for their labour, and insisting upon their taking goods out of his shop for the amount. The jury having found in favour of defendant, in the absence of evidence to support the charge,

Held, setting aside the verdict with costs, and ordering new trial. (1) That the jury should have found for plaintiff. (2) That the trial Judge would have been justified in withdrawing the case from the jury. (3) That the principle of fair comment or criticism should not be extended to cover or justify a charge of sordid or corrupt motives or disgraceful conduct.

W. B. A. Ritchie, Q.C., for appellant. *A. Drysdale*, Q.C., and *E. M. McDonald*, for respondent.

Full Court.] THE QUEEN *v.* HAMILTON. [Jan. 11.

Assault causing bodily harm—Criminal Code, s. 641—Indictment under authority to prefer—Appointment of prosecuting officer under local Act.

Defendant was committed for trial on a charge of assaulting wounding and doing grievous bodily harm to W., and W. was bound over in regular form to prosecute. At the next term of the Supreme Court the grand jury found an indictment against defendant. W. was not present, and was not examined as a witness. The Attorney-General was not present, and no one had any special directions from him to prefer an indictment. No one had the written consent of a judge, and no order of court was made to prefer an indictment. The point was reserved whether the indictment should not be quashed because it was not preferred by any of the persons authorized by s. 641 of the Criminal Code. Under an Act of the Provincial Legislature crimes such as that for which defendant was indicted are prosecuted by an officer or public prosecutor appointed by the Attorney-General at each term of the court, or in default of such appointment by the Court.

Held, per TOWNSHEND and RITCHIE, JJ., (MCDONALD, C.J., concurring) that under these circumstances the presence of the prosecutor was not necessary, and no special direction from the Attorney-General, or written consent of a judge, or order of the court was necessary to make the indictment valid.

Quære, whether s. 641 of the Code is applicable to the procedure before the grand jury in any county of Nova Scotia, except Halifax.

Per WEATHERBEE, and GRAHAM, E. J., (HENRY, J., concurring), that the indictment not having been preferred in accordance with the provisions of the Code, s. 641, the conviction was bad and should be quashed.

Attorney-General for Crown. *F. T. Congdon* for prisoner.

Full Court.] JOHNSTON *v.* MILLER. [Jan. 11.

Levy under execution on judgment entered prematurely—Excessive damages.

The plaintiff was sued by the defendant, and judgment for default of appearance obtained on the 30th June, 1896. Plaintiff paid $100 on account of the judgment, and agreed to pay the balance in instalments. Subsequently it was discovered that the judgment had been entered prematurely, and proceedings were taken which resulted in its being set aside on that ground. Defendant thereupon brought a second action and obtained judgment for the balance due him, giving credit for the $100 paid on account of the previous judgment.

In the present action plaintiff claimed damages for the levy under the judgment irregularly entered, and the return of the amount paid, and the jury awarded him $1.100 damages. There being no evidence of specific damage, and it appearing that the levy complained of was of a merely formal character, none of the goods having been removed, and no one placed in charge,

Held, that the verdict must be set aside unless the plaintiff consented to reduce the verdict to $50, which amount the court considered sufficient.

J. A. Chisholm, for appellant. *A. Drysdale*, Q.C., for respondent.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] FOSTER *v.* LANDSDOWNE. [Nov. 30, 1897.

Practice—Demurrer—Queen's Bench Act, 1895—Rules 280, 426, 440.

The defendants in their statement of defence had, under Rule 280 (3) of the Queen's Bench Act, 1895, incorporated a demurrer to the statement of claim, besides raising questions of fact to be tried. They then, under Rule 426, set down the demurrer for hearing on a Wednesday, and after argument the demurrer was overruled. This decision coming before the full court for rehearing, counsel for plaintiff took the objection that under Rule 440 the demurrer should not have been set down for a separate hearing without an order of a Judge, but should be disposed of at the trial along with the issues of fact.

Held, that the objection would have been good if taken at the proper time; but, as the demurrer had been heard and overruled, the defendant could not now raise it at the trial, and that the rehearing must proceed.

Metcalf and *E. E. Sharpe* for plaintiff. *Attorney-General* and *James* for defendants.

Dubuc, J.] CURRIE *v.* RAPID CITY ELEVATOR CO. [Jan. 20.

Vendor and purchaser—Sale under order of court—Possession, effect of taking—Ex parte order.

This was an application, under Rules 685 and 691 of the Queen's Bench Act, 1895, for an order to issue execution against David Milne, who had, in September, 1896, made a written offer for the purchase of the property in

question in this action at $2,700 each—after an abortive sale by auction. The offer contained a stipulation for a clear deed. Milne went into possession pending the completion of the title and made some alterations in the buildings. Great delays occurred in completing the title, and the purchaser, after having several times requested the vendor to make the title good, finally on the 30th August, 1897, notified the vendor's solicitors that unless title was made to him within two weeks from that date, the offer should be considered as withdrawn, and that he would have nothing more to do with the matter. Two weeks afterwards the purchaser accordingly gave up possession of the property and returned the key. The vendor's solicitors, however, procured a report from the Master dated 18th Sept, 1897, approving of the sale to Milne, and on 29th September an order ex parte from the Chief Justice dispensing with payment into Court of the purchase money and that the payment be made to the Imperial Loan and Investment Company at their office in Brandon within ten days after service of a copy of the order and upon the purchaser receiving a conveyance of the property. No conveyance had been tendered to the purchaser before this application; but it appeared that on being served with a copy of the order he stated that he had withdrawn his offer and given up possession of the property and would have nothing more to do with the matter.

Held, that while the order of the Chief Justice remained in force it must be obeyed, although, probably, if all the circumstances had been made known to him, he would have refused it; and that the purchaser must pay the purchase money into Court within two weeks, and in default that the order for execution should go.

Held, also, that the purchaser had not lost his right to call for a good title by going into possession, and that there should be a reference to the Master as to the title.

No costs of the application were allowed.

Clark, for vendor. *Hough*, Q.C., for purchaser.

Province of British Columbia.

SUPREME COURT.

Bole, Loc. J.] BANK OF MONTREAL *v.* HORNE. [Dec. 15, 1897.

Evidence de bene esse—Rule 749—Expediency.

Application to abridge the month's notice required by Rule 749 which provides that "in any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall, be deemed a proceeding within this Rule," and to examine a witness on the ground that he is seriously ill:

Held, on the authority of *Warner* v. *Mosses*, 16 Ch. D. 100, and giving

weight to the consideration that if the application were refused and the Court of Appeal held that such decision was erroneous, there would be irremedial mischief if the witness died; in the meantime the application must be granted.

Irving, J.] RE KOOTENAY BREWING & MALTING CO. [Jan. 25.

Jurisdiction of Judge of County Court sitting as local Judge of Supreme Court in winding up Company.

Judge Forin made an order in December, 1897, directing the winding-up of the above company, and this was a motion on behalf of the Bank of Montreal to set aside the order on the ground of want of jurisdiction.

Held, that a Judge of a County Court in his capacity of Local Judge of the Supreme Court, is not empowered to deal with winding-up proceedings, which is a "matter" distinct from "actions" and "causes" with which the statute gives him power to deal.

Walkem, J.] GORDON *v.* ROADLEY. [Jan. 26.

Appearance—Irregularity—Setting aside judgment.

This was a case in which the plaintiff sued the defendant for $5,000 for slander. The defendant entered an appearance in person to the writ of summons, but omitted to state his address. The plaintiff signed interlocutory judgment, and the defendant took out a summons to set it aside on the ground of irregularity in that an appearance had been entered, and asked for leave to enter a fresh appearance by a solicitor. The preliminary objection was raised to the application being heard at Victoria without leave, the summons having been taken out in the Kamloops registry. This was overruled, and it was

Held: That the appearance having been entered could not be treated as a nullity by the plaintiff, and the proper course was to apply to set the appearance aside.

Order made setting aside the judgment with costs in the cause, and granting leave to the defendant to enter an appearance by a solicitor.

North-West Territories.

SUPREME COURT.

Rouleau, J.] SPRENGER *v.* GRAVELEY. [Dec. 31, 1897.

Interpleader—Chattel mortgage—Description of goods—Future acquired chattels—Power of sale—Time of payment beyond date for renewal.

Interpleader issue tried by Mr. Justice Rouleau, in which one Sprenger, chattel mortgagee, claimed the goods seized by the sheriff, under an execution on a judgment against the mortgagor, in favour of one Graveley, the execution creditor. The mortgage had been duly registered and renewals filed, and no question was raised as to its bona fides. The goods were described as "all cattle and horses of whatever age and sex branded 5 on the left side, and all

increase thereof from time to time until the moneys hereby secured are fully paid." No locality was stated where the cattle were situate. The goods claimed consisted of one bull and seventeen steers. According to the evidence the animals claimed were all branded as above, and they were all the increase from cows so branded, and they were all born and branded during the currency of the mortgage. The time for payment was three years after the date of the mortgage. A power was given to the mortgagor to sell bulls and steers at any time during the three years.

Held, 1. That the description by brand was sufficient without any locality being given, particularly as the cattle were what are known as range cattle, roaming over a large extent of unenclosed country: *Mason* v. *McDonald*, 25 U.C.C.P. 439; *Field* v. *Hart*, 22 Ont. Ap. 449.

2. That the cattle claimed were the increase of the cattle mortgaged, the mortgagor having the legal and the mortgagee the equitable interest therein, and although a bona fide purchaser for value from the mortgagor could have held these cattle free from the mortgage, an execution creditor was not in the same position and he could only take the legal interest charged with the mortgage. See *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Eyre* v. *Macdonald*, 9 H.L.C. 618; *McAllister* v. *Forsyth*, 12 S.C. 1; *Jellet* v. *Wilkie*, 26 S.C. 288; *Coyne* v. *Lee*, 14 Ont. Ap. 512; *Canada Permanent Co* v. *Todd*, 22 Ont. Ap. 515.

3. That the power given to the mortgagor to sell bulls and steers, did not render the mortgage void, nor did this raise any presumption of fraud, as it was no more than the implied power to sell in the ordinary course of business, and there was no evidence of any fraudulent intention established: *McAllister* v. *Forsyth*, supra: *National Bank* v. *Hampson*, 49 L.J. Q.B. 480; *Walker* v. *Clay*, 49 L.J. C.P. 560.

4. That the fact that the time for payment extended beyond the time within which a renewal should be filed under the N.W.T. Bills of Sale Ordinance, did not render the mortgage void: *O Neill* v. *Small*, 15 C.L.J. 114, not followed.

Muir and *Jephson*, for plaintiff. *Lougheed* and *Bennett* for defendant.

Scott, J.] IN RE TAYLOR. [Jan. 26.

Dominion Land Act, R.S.C.C. 54, ss. 42, 59—Patent issued same day as a conveyance made—Certificate of ownership.

Land was conveyed to one Taylor under the Dominion Lands Act, R.S.C., c. 55, s. 42. The patent for this land was issued to the assignor as of the same date as the assignments, which, therefore, could not be registered in the Department of the Interior, as provided by s. 59. Application was made to the registrar of the South Alberta (N.W.T.) Land Registration District to issue certificate of ownership to assignee by virtue of the assignment made under s 42 of the above Act. The registrator refused, and a reference was made to a Judge of the Supreme Court.

Held, that the transferor evidently intended to transfer all his interest and that certificate to transferee should issue.

C. E. D. Wood (Macleod), for applicant.

Book Reviews.

Manual of Medical Jurisprudence, by ALFRED SWAINE TAYLOR, M.D., F.R.S., revised and edited by THOMAS STEVENSON, M.D., London, 12th American, edited with citations and additions from the 12th English edition, by Clark Bell, LL.D.: Lea Brothers & Co.: New York and Philadelphia. 832 pp.

The wonderful developments of medico legal science has made a new edition of this standard work a necessity. A number of new subjects are presented and discussed. The increasing frequency of accidents, resulting in actions for damages, renders the department devoted to surgery of growing importance, whilst the increased knowledge of chemistry and kindred sciences requires constant attention to keep abreast of the times. This work, as is well known, is a favourite text book in schools of medicine and law, and is as useful to physicians in practice as it is to lawyers in the preparation of briefs. No lawyer, who is engaged in criminal practice, can afford to be without it.

A Treatise on the Law in relation to Promoters and the Promotion of Corporations, by ARTHUR M. ALGER; Boston: Little, Brown & Co., 1897. Toronto: Canada Law Journal Co.

This is a timely treatise on a subject which has become very prominent of late years in this country. We notice that the cases cited are largely from the English Reports, which is accounted for by the fact that the promotion of companies has been a more fruitful source of litigation in England than in the United States. The cases cited are not numerous, so that there has been all the more scope for the author to give them individually a fuller treatment than would otherwise be the case. Mr. Alger is a lawyer of eminence, and especially familiar with company law, and he appears to have done his work excellently well. This book is one which should find a large sale in this country. The book is produced by publishers of high reputation, and the typographical execution does full credit even to them.

A Treatise on the Law of Bailments, including Carriers, Innkeepers and Pledge. By JAMES SCHOULER, LL.D., Professor in the Boston University Law School, and author of treatises on the "Law of the Domestic Relations." Third edition. Boston: Little, Brown & Co., 1897. Price, $6. Toronto: Canada Law Journal Co.

This is the third and an enlarged edition of a book which was written in 1880. As our readers are aware, Mr. Schouler is a recognized authority on the subjects of which he treats. It was not the intention of the author to present any exhaustive collection of cases upon the various branches of law treated upon, but rather to treat the subject from a modern standpoint, and classify the cases so as to give a general and accurate view on the subject of bailments. There has been a large growth of authorities on the old common law doctrines affecting the various matters coming under the general terms bailments, and this especially applies to transactions in reference

to the rights of common carriers, owing to the development of railways, etc. It will be to the more extended treatises on the various subdivisions of the law of bailment that the practising lawyer must refer for brief-making purposes, but there is no work more valuable than the one before us for students and others desiring information as to principles.

Commentaries on the Law of Trust and Trustees as administered in England and in the United States of America, by CHARLES FISK BEACH, Counsellor-at-Law; in two volumes: St. Louis: Central Law Journal Co., 1897. Toronto: Canada Law Journal Co.

To prevent mistakes, it is well to state at once that the book before us is written by the father of Charles Fisk Beach, jr., and we mention this as the name of the latter appears as author of numerous legal treatises, of which it is said others have been mainly the authors, and the son has acquired a not entirely enviable reputation as being a "book maker."

There has been of late years a good deal of vicarious book making. We are aware, for example, of a valuable book, which bears the name of a prominent lawyer in New York, who has taken almost word for word the labours of another probably more competent than himself for the task, and gives the matter to the public as his own, without reference to or acknowledgment of another's brains. A very contemptible proceeding, truly.

It may not be to the detriment of the book before us that the author is largely indebted to the assistance of Mr. E. F. White of the Indianapolis Bar, who, however, is here generously given full credit for his share in the production of the work. However this may be, and whether the work is principally that of Mr. Beach or of Mr. White, we must say it seems to have much merit in its composition, and will be a valuable addition to the literature of this complicated and obscure branch of modern jurisprudence. That it is a work of great industry is manifest, as it contains over 1,800 pages, and refers to over 16,000 cases, gathered from various sources on both sides of the Atlantic. The style is pleasant, good and gives pleasant reading, and the matter itself seems to indicate that it will become a favourite book of reference on this most important branch of the law.

The Law Quarterly Review for January, 1898. London: Stevens & Sons, 119, 120 Chancery Lane.

This opens with the editor's usual budget of apt and pungent comment upon recent decisions. The essays which follow deal with topics the diversified character of which will be realized when we say that they carry us half round the globe, and from the palmy days of ancient Roman jurisprudence, through the twilight of the middle ages, to the most recent stages in the development of the equitable principles in the United States. The first article is "A Prologue to the History of English Law," in which Professor Maitland has extracted from the vast stores of information recently accumulated by painstaking Continental jurists a very readable account of the salient events connected with the growth of modern European law during that period which is covered, for general purposes, by Gibbons' great work. The second article

is a paper upon the "Wage of Law Teachers," by Professor Gregory, of Wisconsin University. Mr. Griffith discourses upon the fascinating topic of "Wills in Ancient Egypt," a department of archæology which, although the materials for research are still scanty, promises to furnish much entertainment hereafter to students of legal history. Mr. Labatt, (to whom our readers are indebted for an article which appeared in our last volume on certain phases of actions of tort, ante vol. 33, p. 713) analyses in an article headed "Preferential Debts of Railway Receivers," the remarkable series of decisions in which the courts in the United States have by judicial legislation introduced into the law of mortgages a new body of rules, the effect of which, in certain cases, is to postpone secured to unsecured creditors in the disquisition of assets of railway companies, whose property is placed in the hands of a receiver pending foreclosure proceedings. This is an excellent article, and decidedly the most useful one in the number to the practising lawyer. We strongly commend this, the best of all law reviews, to the attention of our readers.

Flotsam and Jetsam.

During the days of duelling in the South a certain distinguished lawyer, who was a rapid shot and successful duellist, was said by his friends to have "shot into" celebrity. He evidently was also quite a wit, for, being a small man, he was engaged for a duel with a very large man, whereupon he insisted that, to make the match even, the size of his own figure should be chalked on the body of his adversary, and that any shots striking outside the chalked lines should not count.

A judgment of much interest on both sides of the water, because it constitutes a precedent in the law of railway seats, was recently delivered in London. It appears that a gentleman travelling from London to Hastings had occasion to leave the carriage at Tunbridge Wells, and took the usual precaution to reserve his seat by leaving therein his umbrella and newspapers. While he was absent another passenger seized his place and refused to vacate it until forcibly ejected. The ejected passenger brought an action against the original owner of the seat, and the latter entered a counterclaim for similar damages. The claim for damages for ejectment was dismissed and the counterclaim allowed, the Court holding, in effect, that the universal mode of retaining a seat in a railway carriage is a most reasonable and convenient one. By no means the least important point in the judgment referred to is the Court's assertion that the holder of a seat is privileged to use reasonable force to eject an intruder.—*Albany L.J.*

In the Westminster County Court, England, the case of *Nutt* v. *Hughes* was tried by his Honour Judge Lumley Smith, Q.C., in which a claim for £11 19s. 4d. was made by Mr. David Nutt, the publisher, the defendant being Mr. G. Hughes.

Mr. Sills, solicitor, represented the plaintiff.

The plaintiff, it was stated, published a book for the defendant called "Dvorak, Abu Fernus," and now sought payment of it after giving credit for nine books sold.

Defendant: I have an equitable defence. I applied for a special jury.

His Honour: Yes, you demanded a special jury of four publishers, four authors, and four professors of Arabic, and if possible, a laureate. (Laughter). Where would we get the latter from?

Defendant: Mr. Swinburne, perhaps.

His Honour: We have only ordinary juries here, and if you had had one you would have had one a tailor, another a lodging-house keeper.

Defendant: I wanted a special jury.

His Honour: I will adjourn it for a common jury to be summoned.

Defendant: I do not want a common jury. He went on to protest that the action was premature. His counter-claim had not yet matured. He objected to the plaintiff having sent a copy of the book to the Royal Asiatic Society.

His Honour said he might bring his action, and asked, "Have you any more to say?"

Defendant: Yes, I have a great deal more to say. (More laughter.) It's a great hardship I cannot have a special jury.

His Honour: I am always afraid when people have odd ideas like this——

Defendant: Odd ideas! I have no odd ideas. (More laughter.)

His Honour: Do you want a jury?

Defendant: Not a common jury.

His Honour: Judgment for the plaintiff.

Defendant: I have more to say. I wanted 1,000 copies, and they have only printed 250. That is most damaging to an Orientalist.

His Honour: Mr. Nutt, was any number mentioned?

Mr. Nutt: No number was mentioned.

Defendant went on to complain that at first Mr. Nutt exhibited a copy of the book in the window. Why did he remove it?

His Honour: Have you anything more to say?

Defendant: Yes; a great deal more. (Laughter.)

His Honour: Then fire away. (More laughter.)

Defendant, in reply to his Honour, said he was at Magdalen College, Oxford, before he went to India. He held an Indian diploma in Arabic, and this book would no doubt be used as a key in the Arabic-English schools in India.

His Honour: You are liable for the £11. 19s. 4d.

Defendant: I insist upon being heard.

His Honour: I have heard you at great length.

Defendant: I have a few odd notes here (exhibiting a sheet of paper).

His Honour: Do you want time to pay?

Defendant (with great emphasis): I will not answer such questions until you have heard my case.

His Honour: Stand down.

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We publish in another place (p. 165) an interesting judgment by His Honor Judge Morgan, Junior Judge of the County Court of York, as to the liability of a municipal corporation for damages resulting from ice on sidewalks. The same learned Judge has since given a judgment in the case of *Duhig* v. *City of Toronto*, on a somewhat similar point. In this case a sidewalk known as the Bryce pavement, which it was alleged was of a soft and spongy character, became out of repair in patches, which were mended by filling the decayed places with granolithic pavement, which is exceedingly hard and becomes very slippery in the winter time under certain conditions of atmosphere and temperature. There was no want of care in the mode of reparation of the sidewalk. The plaintiff slipped on one of the hard patches, and suffered injury, and brought an action against the city for negligence. On behalf of the corporation it was urged that there was neither negligence nor want of repair, and that the plaintiff's claim was in effect that the judge should adjudicate upon whether or not the material used was under the circumstances proper for the purpose, it being contended that this was a matter of sound discretion to be exercised by the corporation, and was in fact reasonably exercised.

The learned judge held that although the patching might be dangerous in bringing in juxtaposition materials differently affected by the weather, the reparation had been properly done, and would under ordinary circumstances prove satisfactory, that the pavement only became dangerous under conditions over which the corporation had no control, the evidence showing that there were days in winter when it was safe, and other days when it was not quite safe. He held that the corporation in repairing the sidewalk was not bound to do

more than provide material reasonably suitable for a sidewalk, and for the necessary repairs, and of such a character as was adapted for the use of pedestrians during the greater portion of the year, and that the corporation was not bound to consider, and not bound to provide against exceptional circumstances arising from the elements over which they had no control, and he found for the defendants. From this judgment the plaintiff appealed; but the Queen's Bench Divisional Court, after argument, dismissed the appeal, holding unanimously that the defendants were not liable.

The following authorities were cited: *Pictou* v. *Geldert*, (1893) App. Cas. 524; *Pratt* v. *Stratford*, 16 Ont. A.R. 5; *Yeomans* v. *County of Wellington*, 4 Ont. A.R. 301; *Brant* v. *Hammersmith R. W. Co.*, L.R. 4 H.L. 171; *Caledonia R. W. Co.* v. *Ogilvie*, 2 MacQ. H. L. (Sc.) 229; *Garfield* v. *Toronto*, 22 Ont. A.R. 128; *Raleigh* v. *Williams* (1893) App. Cas. 540; *Johnson* v. *Columbia*, 6 Sup. Ct. Rep. U.S. 924; *City of Detroit* v. *Beckman*, 34 Mich. 125. Con. Mun. Act, 1892, s. 531; 57 Vict., c. 150, s. 13; 59 Vict., c. 51, s. 20.

COURT FOR CROWN CASES RESERVED.

The recent decision of the Chancery Divisional Court in *The Queen* v. *Hammond* (p. 164), seems to emphasize what appears to be a blot on the administration of justice in criminal cases in Ontario. Under the Criminal Code, s. 3 (*e*) the Court for the disposition of Crown cases reserved in Ontario, is any Division of the High Court of Justice. But a Divisional Court of the High Court is a fluctuating tribunal composed from time to time of different judges—now of the judges of the Queen's Bench Division, now of judges of the Chancery Division, and yet again of Judges of the Common Pleas Division, and each of these tribunals, it is held, are so far separate and independent tribunals as that none of them is bound by any decision of either of the other two, so that it is quite possible that three different and conflicting decisions may be given by them severally on the same ques-

tion of law. Two absolutely conflicting and irreconcilable decisions have even now been given by the Judges of the Queen's Bench Division and the Judges of the Chancery Division on the point of law arising on the construction of the Canada Evidence Act, 1893 (56 Vict., c. 31), s. 5.

That section provides that "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving such evidence."

The Judges of the Queen's Bench determined, in *The Queen* v. *Williams*, 26 O.R. 583, that the evidence of a person called as a witness before a coroner, is admissible against him on his subsequently being prosecuted for a criminal offence, unless, at the time of giving his evidence, he expressly claimed to be excused from giving evidence on the ground that his evidence might criminate him. The majority of the Judges of the Chancery Division (Boyd, C., and Robertson, J.) on the other hand have held in *The Queen* v. *Hammond*, that the evidence is inadmissible against the witness on any subsequent criminal prosecution, whether he claimed to be excused from giving evidence before the coroner or not. Meredith, J., however, dissented, and agreed with *The Queen* v. *Williams*. It appears, therefore, that there is a numerical majority of Judges in favour of the latter decision, but in arriving at their judgment in that case, the Judges of the Queen's Bench Division overruled the prior decision of Meredith, C.J. C.P., at nisi prius, in *The Queen* v. *Hendershott*, 26 O.R. 678. There are therefore Armour, C.J. Q.B., and Falconbridge, Street, and Meredith, JJ., in favour of *The Queen* v. *Williams* and the Chancellor, and Meredith, C.J. C.P., and Robertson, J., in favour of the view taken in the *Queen* v. *Hammond*. Considering the momentous interests at stake it must be confessed that this is not a satisfactory method of

administering the criminal law, and it is needless to say that it is a somewhat unpleasant reflection that if the case reserved in *The Queen* v. *Hammond* had been argued before the Judges of the Queen's Bench Division, it would probably have resulted in the affirmance of the conviction of the prisoner upon evidence, the admissibility of which, in any view of the case, must now be considered at all events as doubtful.

The life of a human being in any civilized community ought not to be exposed to any such hazard; and it is entirely contrary to the genius of the modern British criminal law that it should be so uncertain in so material a matter.

It is always an anomalous thing for judges of co-ordinate jurisdiction to arrive at diametrically opposite conclusions on the same question of law, and while it is bad enough in civil cases, it appears to be tenfold worse in criminal cases, as to which the law ought always to be as certain as human ingenuity can make it, and it therefore appears to be a matter urgently demanding the attention of the Dominion Government whether some remedy for the present condition of affairs cannot be found.

In England the importance of securing, as far as possible, certainty on questions of criminal law seems to be recognized. There the court for crown cases reserved is a tribunal composed of all of the Judges of the Queen's Bench Division, or any five or more of them. This tribunal has an inherent identity, although its membership may fluctuate, and the uncertainty consequent on conflicting decisions is thus avoided, and it may be well worth consideration whether it would not be better in Ontario to provide that the court for crown cases reserved should be composed of the whole of the Judges of the High Court, or at all courts of at least seven of them, and that its decision should be binding on the court, however it may be composed.

The difficulty of securing unanimity of opinion among judges where they are at liberty to form independent conclusions untramelled by previous decisions, is well illustrated by two recent cases, *Hawke* v. *Dunn* (1897), 1 Q,B. 579, (noted ante vol. 33, p. 578), and *Powell* v. *Kempton Park* (1897),

2 Q.B. 242 (noted ante vol. 33, p. 762) where five of the Judges of the Queen's Bench Division in a Crown case reserved arrived at one conclusion as to the meaning of a statute, and five of the Judges of the Court of Appeal in a civil proceeding arrived at a diametrically opposite conclusion as to its meaning. The criminal law in England, however, we apprehend, would be regarded as settled by the decision of the Criminal Court, and not by that of the Civil Court, notwithstanding its superior authority as a Court of Appeal. The anomaly of two courts for the administration of the criminal law arriving at opposite conclusions on the same point of law is at all events avoided there.

The present condition of things in Ontario is not only open to the serious objection that the law in one of its most important branches is liable to be rendered uncertain, but it is open to the further objection that the uncertainty of the law renders the administration of justice unnecessarily costly and burthensome to the public. In this very case of *The Queen* v. *Hammond*, the Judge at the trial admitted the evidence objected to, on the authority of the decision in *The Queen* v. *Williams*, and now the very heavy expense of a further trial has to be borne by the public. The counsel for the Crown, moreover, was placed in a position of great embarrassment. Had he neglected to offer the evidence in question he would have laid himself open to a charge of serious neglect of duty, and yet in offering this important evidence he had to take upon himself the equally serious risk of incurring the enormous expense involved by a third trial of the prisoner.

On the abstract merits of the question involved in the conflicting decisions which have been referred to, it may not be inopportune to offer some observations. With regard to the question which of the two Courts has correctly interpreted the statute, it would be presumptuous for me to offer any opinion, but it may be worth while to discuss what the law on the point ought to be. The fundamental principle of the criminal law that no man ought to be compelled to accuse himself is one that ought to be jealously

guarded, but it must be remembered that that principle has never been held to prevent a person from being found guilty on his own confession. Very often a prisoner after pleading guilty is permitted to withdraw his plea and substitute one of not guilty, but a confession freely and voluntarily made is perfectly good evidence. The fact that such a confession may be used against the person making it, is necessarily a wholesome deterrent against persons confessing to crimes of which they are really guiltless in order to shield the person who is really guilty. Now it is very important that this deterrent should not be lightly removed. The decision in *The Queen* v. *Hammond* may lead to this unpleasant result, that if A. B. is accused of a murder which he really has committed, his friend C. D. may step into the box, in order to shield him from the consequence of his crime, and swear in the most positive and unequivocal and circumstantial manner that he, C. D., committed the murder, with no other danger to be apprehended to himself than a prosecution for perjury. In the face of such evidence it may be very difficult to induce a jury, even with the most circumstantial proof of guilt, to find a verdict against the real criminal.

This seems to be by no means an improbable case, and the annals of the criminal law would disclose many instances in which a false confession of this kind has been made to shield another. The law as interpreted in *The Queen* v. *Hammond* may, it is to be feared, open the door to that kind of testimony, and especially as the terror of incurring the risk of having such evidence used against the party giving it is altogether removed.

It is submitted that the section of the Evidence Act under discussion needs reconsideration, and that more ample safeguards should be provided than there are at present, against the manufacture of false evidence in order to shield the guilty.

GEO. S. HOLMESTED.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

MARINE INSURANCE—POLICY—COLLISION—SUNKEN VESSEL.

In *Chandler* v. *Blogg* (1898) 1 Q.B. 32, the policy sued on contained the usual clause that the insurer would pay all claims for loss or damage done or received through collision. The vessel insured was damaged by coming into collision with a barge which had just been sunk by collision with another vessel. The barge was raised next day and sailed to her home port, and was repaired. It was held by Bigham, J., that the plaintiff was entitled to recover because though "collision" prima facie means collision with some other navigable vessel, yet though the barge could not at the moment of collision have been navigated, nevertheless she was a vessel, and was navigable within the meaning of the policy, though temporarily disabled.

CONTRACT OR TORT — COSTS — CONTRACT OF AGISTMENT — BAILMENT — NEGLIGENCE—(ONT. RULE 1132).

Turner v. *Stallibrass* (1898) 1 Q.B. 56, may help to solve the difficulty which not unfrequently arises in determining whether an action is founded on tort or contract, for the purpose of determining either a question of jurisdiction, or a question of costs under Ont. Rule 1132. The action in this case was brought to recover damages for breach of a contract of agistment arising from the negligence of the defendant, and it was held by the Court of Appeal (Smith, Rigby and Collins, L.JJ.) that the action was founded in tort. Smith, L.J., states the rule of law on the subject as follows: "If in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but on the other hand if it is necessary for him to rely upon and prove a contract, the action is one founded upon contract." The mode in which the action is stated the pleadings, or in

the address of counsel, is, in the opinion of the Court of Appeal, entirely immaterial. In this case the plaintiff showed a good cause of action by proving a bailment on which a duty arose at common law on the part of the defendant not to be negligent in respect of the plaintiff's horse, and a breach of that duty. That being the case and the plaintiff's right of action being independent of any contract, the Court held that it was one founded on tort. Collins, L.J., states that although the relation of bailor and bailee arises out of some agreement of minds, yet that agreement of minds is not the contract contemplated in the rule as stated by Smith, L.J. The duty arises, in his view, by virtue of the relation of bailor and bailee, and not by reason of any contract whereby that relation is brought about; but wherever the plaintiff claims that the defendant ought to have done something, or taken some precaution, not embraced in his common law liability, that there the plaintiff is obliged to rely on a contract within the meaning of the rule.

INTERPLEADER—SALE OF GOODS IN INTERPLEADER PROCEEDINGS — ORD. LVII, R. 12—(ONT. RULE 1112.)

Stern v. *Tegner* (1898) 1 Q.B. 37, may be usefully referred to as indicating the opinion of the Court of Appeal (Lindley and Chitty, L.JJ.) as to the circumstances under which the jurisdiction of the court to order a sale of goods in dispute in interpleader proceedings, may properly be exercised. Lindley, L.J., says at p. 41: "There are three cases which arise in practice. First of all where the security is ample, and where the bill of sale holder tries to assert his rights so as to defeat the execution creditor. That is the common case which s. 13 of the C.L.P. Act, 1860, was intended to rectify. The bill of sale holder cannot stand upon his rights, when it is plain that he is defeating the execution creditor, which of course involves the assumption that after paying off the bill of sale there will be something left. That is a plain case; in such a case a sale will be ordered.—The next case is where the security is plainly deficient. There if there were a sale there would not be a surplus, whence it follows that the only proper course is to

direct the sheriff to withdraw. What has the execution creditor to do with the goods, if he cannot possibly get anything out of them? That is another plain case.—The third case is somewhat more difficult. When it is difficult to say whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the court to say, 'Unless the execution creditor will guarantee the secured creditor against loss by sale we will not order the sale,'" and the case coming within the third class and the execution creditor, and another claimant refusing to redeem or give the required guarantee, an order for sale was reversed.

CRIMINAL LAW—OBTAINING CREDIT BY FRAUD—FALSE PRETENCES—(CR. CODE, ss 358, 359).

In *The Queen* v. *Jones* (1898) 1 Q.B. 119, the Court for Crown Cases Reserved (Lord Russell, C.J., and Wright, Kennedy, Darling and Channell, JJ.) were called on to determine whether the act of going into a restaurant with only a half-penny and ordering and consuming a four shilling meal was a criminal offence, and if so to what category it belonged. The Court held that it was a criminal offence, but that it was not obtaining goods by false pretences, as no representation was made by the prisoner, and that the offence was obtaining credit by fraud within the meaning of the Debtors Act, 1869, s. 13. The Criminal Code does not appear to include any similar provision and it would seem that such an act as was in question in this case would not be indictable in Canada.

MASTER AND SERVANT—CUSTOM—REASONABLENESS—NOTICE TO DETERMINE SERVICE AT END OF FIRST MONTH.

Moult v. *Halliday* (1898) 1 Q.B. 125 is a decision of Hawkins and Channell, JJ., on appeal from a County Court, in which those learned judges determined that there is no recognized custom with regard to the hiring of domestic servants, which enables either party to terminate the service at the end of the first month on giving a fortnight's notice; but that if such a custom were proved it would be reasonable, and would be given effect to by the Court. The Court

adopt the statement of Parke, B., in *Turner* v. *Mason.* "The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages," as expressing the custom recognized by the Court as governing such contracts, and the attempt to establish an exception to this was held to have been unsustained by evidence.

PROBATE—DEATH OF ONE OF TWO TESTATORS - JOINT WILL.

In the goods of Piazzi—Smyth (1898) P. 7. This was an application to obtain a grant of probate of a joint will of two persons, only one of whom was dead. The Court granted probate of so much of the instrument as became operative on the death of the decedent.

ADMINISTRATION—WILL ANNEXED.

In the goods of Butler (1898) P. 9, Jeune, P.P.D., held that where a limited administration is applied for as to part of the estate of a deceased testator (in this case certain leaseholds) the will mnst be annexed to the grant.

ADMINISTRATION—NOTICE—GRANT TO ATTORNEY.

In the goods of Barton (1898) P. 11, administration had been granted to the attorney of one of two next of kin, both of whom resided out of the jurisdiction, the administrator having died, upon the application of the other next of kin, and on proof of notice to the next of kin for whose benefit the administration had been granted, and no objection being offered by him, the application was granted.

PROBATE—RENUNCIATION — RETRACTION OF RENUNCIATION — PROBATE ACT, 1857, 20 & 21 Vict. c. 77, s. 79. (R.S.O., 1897 c. 59 s. 65).

In the goods of Stiles (1898) P. 12, Jeune, P.P.D., decided that the effect of 20 & 21 Vict. c. 77, s. 79 (see R.S.O. 1897 c. 59 s. 65) is not to prevent one of several executors who has renounced from subsequently retracting his renunciation; and one of two executors after taking probate, having absconded, the Court allowed his co-executor who had renounced to retract his renunciation and take probate. The learned judge held that the effect of the section above referred to is merely to dispense with the necessity of afterwards citing an executor who has renounced.

PRESUMPTION OF DEATH—ABSENCE FOR THREE YEARS.

In the Goods of Matthews (1898) P. 17, this was an application by a legatee and one of the next of kin for leave to depose that the death of the testator had occurred on or since Nov. 24th, 1894. On that day he, being then seventy-three years of age, had disappeared from his home, and had never since been heard of. Proof was given of enquiries having been made and of advertisements having been published in five newspapers, and the President being satisfied that there had been ample enquiry granted the application.

COMPANY—DIRECTORS—CLAUSE VALIDATING ACTS OF DE FACTO DIRECTORS.

In *Dawson* v. *African Consolidated L. & T. Co.* (1898) 1 Ch. 6, the plaintiff sought to restrain the defendant company and its directors from enforcing a call by declaring plaintiff's shares forfeited for non-payment, on the ground that the call had not been validly made. The invalidity relied on was that one of the directors had vacated his office by reason of having for six days parted with all his shares. It appeared that after the six days he acquired other shares and there was no evidence that his co-directors had reappointed him, or had been aware of his disqualification, but they all along treated him as a duly qualified director. One of the articles of the company provided that all acts done at any meeting of directors, or by any person acting as a director should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that any of the directors were disqualified, be as valid as if every such person had been duly appointed and qualified to act as a director. The Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) were of opinion that this clause cured the alleged irregularity and that the call was valid, and they overruled Ridley, J., who had granted an interlocutory injunction in favour of the plaintiff.

APPOINTMENT—GIFT OF SUFFICIENT TO RAISE A "NET SUM"—SUCCESSION DUTY.

In re Saunders, Saunders v. *Gore* (1898) 1 Ch. 17, a summary application was made to the Court by originating summons for the purpose of determining the question of the incidence

of succession duty under the following circumstances. In pursuance of a power of appointment in a marriage settlement the appointor appointed that so much of the stocks and securities held by the trustees "as shall be sufficient to raise the net sum of £2,000" should, subject to the life interest of the appointor, "henceforth belong to and be vested in" E., an object of the power, and be held in trust for him. Stirling, J., was of opinion that the appointee took subject to the payment of succession duty, but the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) reversed his decision and in doing so differ from *Banks* v. *Braithwaite*, 32 L.J. Ch. 35, on which, Stirling, J., relied.

TENDER—CHEQUE—SOLICITOR.

In *Blumberg* v. *Life Interests and R. S. Corp.* (1898) 1 Ch. 27, the Court of Appeal (Chitty and Williams, L.JJ.) have affirmed the decision of Kekewich, J., (1897) 1 Ch. 171 (noted ante vol. 33 p. 284.) It may be remembered that the question before Kekewich, J., was as to the validity of a tender by cheque to a solicitor of mortgagees, and his decision was that a solicitor has no implied authority to accept a cheque; and that a tender made in that way is not a valid legal tender. But in the Court of Appeal the case seems somewhat to have turned on the fact that the sale made by the mortgagees had been effected for an excellent price, which was not denied, and that the appellants had no grievance, and that there was no point of law or substance justifying the appeal. This may perhaps be considered an affirmance of the point of law on which the case was decided by Kekewich, J., though the Court do not except in this general way refer to it.

TENANT FOR LIFE—REMAINDERMAN—REPAIRS.

In re Freman, Dimond v. *Newburn* (1898) 1 Ch. 28, is a decision of North, J., on the question whether a tenant for life of real estate is liable to keep the estate in repair during his tenancy. The estate in question had been purchased by the trustees of a settlement in pursuance of a power therein contained, and which provided that the estate so purchased was to be held as personal estate. North, J., held on the author-

ity of *Powys* v. *Blagrave*, 4 D. M. & G. 448, and *In re Cartwright*, 41 Ch. D. 532, that in the case of real estate a tenant for life is not liable for repairs, and that there was no difference in principle in the present case where the land was to be held as personal estate. He therefore directed that the cost of the repairs should be borne by the capital, but held that the tenant for life was liable to keep down the interest on money borrowed for the purpose of such expenditure, or if made out of the capital he should lose the interest on the money so expended.

In a recent case of *Patterson* v. *Central Canada Loan & S. Co.* the same point was before the Divisional Court on 27th Jan., 1898, and the cases referred to by North, J., were said to be contrary to an earlier decision of Lord Hardwicke; judgment has since been given in accordance with the above case.

MARRIED WOMAN—SEPARATE ESTATE—WIFE EXPENDIDG MONEY TO PAY HUSBAND'S DEBTS.

Paget v. *Paget* (1898) 1 Ch. 47 although bearing principally on the effect of an order made under a statute enabling the Court to relieve a wife's property from a restraint against anticipation, of which we have in Ontario no counterpart, may, nevertheless, be noticed for the statement of Kekewich, J., that the doctrine that a wife is entitled to be indemnified by her husband's estate after his death, against loss incurred by contribution out of her separate estate towards payment of his debts, necessarily involves the right to be indemnified by him personally if living.

COPYRIGHT—INFRINGEMENT—SEVERAL REMEDIES FOR SAME WRONG—COMBINING CAUSES OF ACTION—DAMAGES—COPYRIGHT ACT 1842 (5 & 6 VICT., C. 45) SS. 15, 23, 26.

In *Muddock* v. *Blackwood* (1898) 1 Ch. 58, Kekewich, J., decided that a plaintiff suing for an infringement of copyright may combine in the same action a claim for damages under s. 15, and also a claim in detinue or trover, or if necessary both combined, to recover the infringing copies, or damages for their conversion under s. 23, and that he is not

shut up to one or other of such remedies. In addition to the usual injunction against further infringements, he granted an order for delivery up on oath of the copies in the defendant's possession, and awarded damages to the amount of £42, although the defendant's sales had resulted in a net loss of 5s 6d.

PUBLIC OFFICER—TRESPASS—LIABILITY OF SERVANTS OF CROWN—PREROGATIVE—AMENDMENT.

In *Raleigh* v. *Goschen* (1898) 1 Ch. 73, Romer, J., lays down the law respecting the liability of officers of the Crown for wrongful acts committed by them or their subordinates by their authority. The action was brought against the Lords of the Admiralty in their official character, to establish as against them that they were not entitled to enter upon, or expropriate by compulsory purchasec, ertain lands of the plaintiff, for the purpose of erecting thereon a training college for navel cadets, and claiming damages for alleged trespass, and an injunction to restrain further trespasses. The learned judge holds that such an action will not lie against officers of the Crown in their official capacity. That the Crown cannot be sued in tort, neither can its officers in their official character.—But he also holds that the alleged authority of an executive department of the government is no justification for a trespass: but only those who actually commit or authorize the trespass are liable; and therefore the chief of a department is not liable for the acts of subordinates unless he actually authorizes them. Under these circumstances it was held that the action was not maintainable, and the plaintiffs then desired to amend so as to convert the action into one against the defendants individually; but the learned judge refused the amendment which would entirely change the character of the action; the dismissal, however, was without prejudice to any further action the plaintiff might bring against the defendants individually.

VOLUNTARY DEED—CONSTRUCTION—RECITAL—ESTOPPEL—APPOINTMENT—SUBSEQUENT ACQUISITION OF ESTATE BY GRANTOR.

Lovett v. *Lovett* (1898) 1 Ch. 82, was an action by a grantor in a voluntary deed, for the purpose of obtaining a declaration of the Court that a subsequently acquired interest had not

passed by the deed. The deed in question was a post-nuptial settlement, and it recited, as was the fact, that the grantor was entitled to a reversionary interest thereby purported to be conveyed, under a settlement of 15th April, 1874, and she thereby conveyed such reversionary interest in trust for herself for life, then to her husband for life, and on the death of the survivor, on the usual trusts for their issue, and in default of issue for the grantor. The grantor's interest, was, however, defeasible and only took effect in default of appointment, and after the making of this deed the plaintiff's mother in pursuance of the power of appointment, irrevocably appointed the property subject to the power in favour of the plaintiff absolutely. It was contended that the plaintiff was estopped by the recital in the deed from disputing that the subsequently acquired interest under the appointment passed under her deed; but Romer, J., was of opinion that the doctrine of equitable estoppel cannot be invoked by a volunteer, and that the deed could not be construed as passing any greater interest than the grantor actually had at its date, and he made the declaratory judgment as prayed by the plaintiff.

WILL—ABSOLUTE GIFT—GIFT BY CODICIL "INSTEAD OF" BEQUESTS IN WILL—REVOCATION.

In re Wilcock, Kay v. *Dewhirst* (1898) 1 Ch. 95, was a case for the construction of a will. The point was whether an absolute gift made by the will had been effectively revoked by the codicil. By the will in question the testator bequeathed his personal estate to his two daughters equally; but by his codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughters absolutely," his executors should stand possessed of his personal estate in trust for sale and conversion, and to pay the income in moieties to his two daughters for life, and on the death of either of them to pay the moiety of the trust moneys to their children as they should appoint; but the codicil contained no gift over in the event of either daughter without issue. One of the daughters having died without issue, the question was whether the codicil had the effect of revoking the absolute gift to the deceased daughter, and consequently whether there

was an intestacy as to her moiety. Romer, J., determined that the codicil must be construed as revoking the prior absolute gift only so far as was necessary to give effect to its express provisions, and following *Doe* v. *Marchant*, (1843) 6 M. & G. 813, he held that the deceased daughter's personal representative was entitled.

COMPANY—WINDING UP — CONTRIBUTORY — APPLICATION TO REMOVE NAME FROM LIST—WAIVER.

In re Brinsmead (1898) 1 Ch. 108, was an application in a winding-up proceeding by a person to whom shares in the company had been allotted, to have his name removed from the list of contributories, and to rescind the contract, if any, to take the shares. The motion was resisted on the ground that the applicant had appeared and taken part in opposing the granting of the winding-up order, and in appealing therefrom. Before the winding-up proceedings were instituted the applicant had commenced proceedings against the company to rescind the contract. Wright, J., held that the applicant had not waived his right to make the present application, which he granted on the merits.

COMPANY—WINDING UP—CONTRIBUTORY—ERROR OF SUBSCRIBER FOR SHARES AS TO IDENTITY OF COMPANY.

In re International Society of Auctioneers, etc., (1898) 1 Ch. 110, was also an application in a winding-up proceeding to have the name of the applicant removed from the list of contributories. The ground on which the application was based was that the applicant in applying for membership had believed, which belief was known to, and fostered by the person who obtained his subscription, that the society he was applying for membership in was an old established society, whereas in fact it was a new society with a similar name. In answer to inquiries subsequently made of the new society, untruthful statements were made to the applicant which had the effect of keeping him in ignorance as to the identity of the society. Wright, J., held that the principle of *Cundy* v. *Lindsay*, (1878) 3 App. Cas. 459, applied, and that there was no contract, and the applicant was entitled to have his name removed, although he had not, before the winding up, taken any steps to have it declared that he was under no liability.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

Davidson, J. Pro hâc vice. } THE QUEEN *v.* OGILVIE. [Nov. 16, 1897.

Contract—Conflict of law—Appropriation of payments—Receipt—Error—Rectification.

The doctrine that where a contract is made in one Province in Canada, and is to be performed either wholly or in part in another, then the proper law of the contract, especially as to the mode of its performance, is the law of the Province where the performance is to take place, may be invoked against the crown as a party to a contract.

2. While both the English law and the law of the Province of Quebec give to the debtor owing several debts the option of appropriating any payment he may make to any particular one of such debts, provided he exercise his option at the time of such payment, yet under the Quebec law where the debtor does not exercise such option, and thus gives a right to the creditor to appropriate the payment, the creditor must exercise his option immediately upon payment being made, and cannot delay exercising it up to the time of trial as he may do under the doctrine of the modern English cases.

3. Where a person owing several debts has accepted a receipt from his creditor by which a specific imputation is made, he may afterwards have the payment applied upon a different debt by showing that he had allowed the former imputation to be made through error, unless the creditor has been thereby induced to give up some special security.

The Solicitor-General, *J. N. Greenshields*, Q C., *E. L. Newcombe*, Q.C., for the plaintiff. *J. S. Hall*, Q.C., *W. D. Hogg*, Q.C., for the defendant.

Burbidge, J.] WOODBURN *v.* THE QUEEN. [Nov. 29, 1897.

Contract—Statutory requirements—Informality—Ratification by the Crown.

A contract entered into by an officer of the crown, empowered by statute to make such a contract in a prescribed way, although defective in respect of the statutory requirements, may be ratified by the crown.

R. V. Sinclair, for suppliant. *W. D. Hogg*, Q.C., for respondent.

THE QUEEN *v.* KILROE.

Information of intrusion—Possession and mesne profits—Joinder of claims—Judgment—Costs.

Rule 21 of the General Rules of Practice on the Revenue side of the Court of Exchequer in England made on the 22nd June, 1860, which prohibits the joinder of claims for the recovery of mesne profits or damages in an infor-

mation for intrusion upon lands of the Crown, governed the practice of the Exchequer Court of Canada in such matters until May 1st, 1895, when a general order was passed by that court, enabling the joinder of such claims.

Rule 36 of the English Rules above mentioned, providing that in cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown, is still in force in the Exchequer Court of Canada.

W. E. Hodgins, in support of motion for judgment.

DAVIDSON *v.* QUEEN.

Petition of Right—Damages from public work—Liability of Crown—Assessment of damages once for all—50-5, Vict., c. 16, s. 16 (b).

The Dominion Government constructed a collecting drain along a portion of the Lachine Canal. This drain discharged its contents into a stream and syphon culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times the suppliant's farm was flooded and his crops thereby injured. The flooding was not regular and inevitable, but depended upon certain natural conditions which might or might not occur in any given time.

Held, that the Crown was liable in damages; that the case was one in which the Court had jurisdiction under clause (*b*) of s. 16 of the Exchequer Court Act; and that in assessing the damages in such a case the proper mode was to assess them once for all.

J. U. Emard, for suppliant. *J. S. Hall*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Maclennan, J.A.] [Feb. 11.

IN RE TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

Appeal—Drainage Act, 57 Vict., c. 56, s. 106—Rules applicable to High Court appeals—Time—Vacation—Motion to confirm proceedings—Costs.

The Rules applicable to appeals from the High Court to the Court of Appeal are to be applied, as far as possible, to appeals from reports of the Drainage Referee under the Drainage Act, 57 Vict., c. 36; and the Christmas Vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made.

Where the respondents' solicitors, by letter, insisted that the appeal was not regularly or properly brought, the appellants were justified in making a motion to extend the time for taking certain steps or to confirm the proceedings taken, and were entitled to the costs of such motion, although it was, strictly speaking, unnecessary, because the proceedings were found to be regular.

J. H. Moss, for appellants. *E. D. Armour*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Robertson, J.
Trials of actions. [Jan. 10.

HOEFNER *v.* CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance—Friendly society—Relief certificate—Non-compliance with rules as to initiation.

Action on relief fund certificate for $1,000 issued by defendants, who were incorporated under R S.O. 1877, c. 167, on one Hoefner, deceased, in favour of the plaintiff. The deceased was balloted for and elected at a meeting of a subordinate council, but died before being duly initiated according to the rules of the Order before a duly constituted court of the council, though an irregular initiation had taken place before the Chief Councillor and the Prelate of the Order, and the subordinate council falsely recorded in their minutes that the deceased had been initiated at a certain meeting.

Held, that the defendants were not bound by the irregular acts of the subordinate council which could not, nor could its officers, waive the requirements of the company's laws in respect to the relief fund, and as the deceased had not been properly initiated the plaintiff could not recover.

Teetzel, Q.C., and *McClement*, for the plaintiff. *Aylesworth*, Q.C., and *Lee*, for the defendants.

Boyd, C.] LAFRANCE *v.* LAFRANCE. [Jan. 11.

Alimony—Interim allowance—Consent judgment in former action—Payment—Separation deed—Change of circumstances.

In 1897 a wife brought an action against her husband for alimony, and to set aside a judgment pronounced by consent in a former action for alimony begun in 1884, under which the wife had received $200. The defendant pleaded the judgment as a bar, and also adultery by the wife, and a deed of separation. The plaintiff disputed the deed of separation, and impeached the judgment as obtained by fraud and without her knowledge or consent; the payment of $200 she attributed to a release of dower given by her. She also alleged expulsion and desertion by her husband, and that he had been living in adultery after the judgment.

Held, that under these circumstances, the plaintiff was entitled to an order for interim alimony.

Atwood v. *Atwood*, 15 P.R. 425, distinguished. *Henderson* v. *Henderson*, 19 Gr. 464, followed. *Morrall* v. *Morrall*, 6 P.D. 98, and *Williams* v. *Baily*, L.R. 2 Eq. 731, also referred to.

W. B. Taylor, for plaintiff. *H. W. Church*, for defendant.

Armour, C.J., Street, J.] ARMSTRONG *v.* ARMSTRONG. [Jan. 31.

Security for costs—Plaintiff out of jurisdiction—Property within jurisdiction—Administration order—Consent to charge share with costs—Place of reference.

A plaintiff residing out of the jurisdiction, but owning a substantial amount of property within it, should not be ordered to give security for costs.

And where a plaintiff was applying summarily for an administration order, and it appeared that he had an interest worth $273 in the estate in respect of which he applied, he was absolved from giving security for costs, although his residence was out of the jurisdiction, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs which he might be lawfully ordered to pay in the course of the administration proceedings.

The testator lived and died in the county of S.; the defendant executor lived there; and one of the two parcels of land which made up the real estate of the testator was in that county. The other and smaller parcel of land was in the county of Y., and the plaintiff's solicitor practised there.

Held, that the reference should be to the Master at the county town of S.

Gallagher, for plaintiff. *Aylesworth*, *Q.C.*, and *Scanlon*, for defendant.

Street, J.] MILLER *v.* BATTY. [Feb. 1.

Limitation of actions—Ejectment—Tenant at will—Commencement of statutory period.

Ejectment and for recovery of rent and mesne profits. The defendant entered into possession in July, 1886, upon a promise from his father, the true owner, to give him the land, and had remained in possession ever since, without disturbance and without payment of rent, or anything in the nature of rent, and without any acknowledgment of his father's title. This action was begun on the 19th May, 1897, by the executors and devisees under the will of the father.

Held, that the defendant's position from July, 1886, when he entered upon his possession, was that of a tenant at will to his father. and, for the purposes of the statute, that tenancy must be taken to have continued until July, 1887. During that period the statute did not begin to run in his favour. This action was therefore brought before the defendant's possession had ripened into a title, and the plaintiffs must have judgment for possession of the land with costs of the action. *Keffer* v. *Keffer*, 27 C.P 257, referred to.

J. Armstrong, for plaintiffs. *J. M. Kilbourn*, for defendant.

Boyd, C., Robertson, J. } PATTERSON *v.* CENTRAL CANADA L. & S. CO. [Feb. 2.

Waste—Permissive waste—Tenant for life—Growth of weeds.

An action for permissive waste will not lie against a tenant for life. *Re Cartwright*, 41 Ch. D. 532 (1889), followed.

The spread of weeds, such as mustard and quack grass, from natural causes or by the action of cattle depasturing or eating hay or straw that comes from the fields where the weeds were, and the failure to overcome the growth and spread of the weeds by a process of summer fallowing or hand-picking is no evidence of waste, but only of ill-husbandry. The fact that there is an Ontario statute for the prevention of the spread of noxious weeds does not make any difference in this respect.

N. F. Davidson, for plaintiff. *Dumble*, for defendants.

MacMahon, J.] BEAULIEU *v.* COCHRANE. [Feb. 3.

Trade union—Expulsion of member—Fine—Conspiracy — Remedy—Action Bar—R.S.C. c. 131, s. 4—Libel—Malice—Privilege.

An action by a member of a trade union against certain of his fellow-members for an alleged conspiracy and for unlawfully imposing a fine upon him and expelling him from the union and depriving him of its benefits, and for libel. There was no evidence warranting a finding that the defendants had entered into a conspiracy to inflict a fine and thus cause the plaintiff's expulsion from the union. The plaintiff had a monetary interest in the death benefit and sinking funds of the union.

Held, notwithstanding this, and notwithstanding the fact that the imposition of the fine was wholly illegal and unwarranted by the rules of the union, and was virtually an expulsion of the plaintiff, he had no remedy by action; for by the Act respecting trades unions, R.S.C. c, 131, s. 4, the Court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members; and this action came within these words. *Rigby* v. *Connel*, 14 Ch. D. 428, followed.

The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed.

Held, that there was evidence of malice, and the publication was not, therefore, privileged.

Belcourt, for plaintiff *T. McVeity*, for defendants.

Divisional Court.] REILLY *v.* MCILLMURRAY. [Feb. 7.

Lien on race horse by trainer—Use by owner—Right of continuing possession—Loss of lien by parting with possession—Resumption of possession—Revivor of lien.

In an action of replevin for a mare in which the defendant set up a lien for training her for races, it was shown that the owner had on one occasion at least apparently as of right gone to the defendant's stable, harnessed and driven her away, and returned her when he was done with her, and according to the weight of the evidence taken her on other occasions, and after the death of the owner the defendant had under the instructions of the solicitor for his administratrix (plaintiff) taken her to a sale stable and left her there a week for the purpose of selling her, and when he got her back undertook to keep her upon payment of a certain sum per month.

Held, that on the evidence there was not such right of continuing possession as would give the defendant a lien, as the owner was at liberty to use the mare whenever he desired; and that even if the defendant had a lien he had lost it by delivering her to the sale stable, when he gave up complete

possession, where she remained at the cost and under the control of the plaintiff, and that the subsequent possession by the defendant did not revive the lien as such possession was taken under a new and different agreement. Judgment of the County Court of York reversed.

O'Donohue, Q.C., for appeal. *A. F. Lobb*, contra.

Boyd, C., Robertson, J.] THE QUEEN *v.* HUGHES. [Feb. 8.

Liquor License Act—Club—Conviction of steward—R.S.O. c. 194, secs. 50, 53, 108, 112.

Motion on rule nisi to quash conviction for keeping liquor for the purpose of sale without license. The evidence showed that the defendant was the steward of an incorporated bicycle club, which by its charter was prohibited from selling intoxicating liquors; that he kept a bar in a room in the building of which the club was lessee, and, as agent of the club, supplied liquors, which apparently belonged to the club, at his own discretion, to such of the members and others, as presented tickets purchased from the club.

Motion dismissed with costs; and *held*, defendant rightly convicted under R.S.O. 1887, ss. 50, 53, 108, 112.

Ritchie, Q.C., for defendant. *J. R. Cartwright*, Q.C., for prosecutor.

Boyd, C., Meredith, J.] IN RE FORSTER. [Feb. 9.

Costs—Style of—Cause removed from Surrogate Court—Order of transfer—Terms—Consent judgment—Costs out of estate.

An order transferring a cause or proceeding from a Surrogate Court into the High Court contained a clause providing that in the event of the defendant, the applicant for the order, failing to establish his defence, his costs, if any were allowed him, should be on the Surrogate Court scale. By a consent judgment, which recited the pleadings and proceedings, and adjudged that the will which was disputed by the defendant was the last will of the testatrix, and should be admitted to probate, it was also adjudged that the costs of all parties should be paid out of the estate.

Held, upon appeal from taxation, that the defendant was bound by the order of transfer, and his costs should be taxed on the scale of the Surrogate Court.

L. G. McCarthy and *D. L. McCarthy*, for the appellant. *C. J. Holman* and *Pattullo*, for respondents.

Boyd, C., Meredith, J.] VIDEAN *v.* WESTOVER. [Feb. 10.

Appeal—Waiver—Acting on judgment—Quashing appeal—Costs.

Appeal from the decision of Ferguson, J., (ante. p. 35) quashed, following *International Wrecking Co.* v. *Lobb*, 12 P.R. 207, and *Keith* v. *Keith*, 25 Gr. 110, because the defendant was held to have waived his right of appeal by acting upon the judgment in obtaining his costs out of the fund in Court, pur-

suant to the judgment, which costs, with the plaintiffs' costs, also paid out, exhausted the fund. Appeal quashed without costs, as no motion to quash was made by respondents.

Tremeear, for appellant. *C. J. Holman*, for respondents.

Armour, C.J., Street, J.] GIGNAC *v.* ILER. [Feb. 10.

Insolvency — Conveyance by insolvent debtor — Preference — Impeaching — Pressure — Time — Consideration — Untrue statement in conveyance — Proof of other consideration — Burden of proof — Statute of Elizabeth.

Appeal by the plaintiff from the judgment of Meredith, J., dismissing the action, which was brought against the sheriff of the County of Essex and his bondsmen, for damages for wrongful seizure and conversion of a crop alleged to be the property of the plaintiff. but seized and sold by the sheriff under an execution against one Antilla, who had conveyed to the plaintiff the land on which the crop grew. The trial Judge held that the crop was not the plaintiff's because the conveyance to him was an unjust preference by an insolvent debtor, and therefore void.

Held, that as there was evidence of a request amounting to pressure on the part of plaintiff for the conveyance to secure him against the liability he was under for Antilla, and the first proceeding taken to impeach the transfer was the actual seizure by the sheriff more than sixty days afterwards, the transfer could not be impeached as a preference. But the transaction was void under the statute of Elizabeth. The statement of the consideration was untrue, because there was, confessedly, no exchange of properties, as stated in the conveyance. The onus was upon the plaintiff to prove beyond reasonable doubt that there was some other good consideration. The plaintiff contented himself with giving his own unsupported evidence of the existence of a consideration, which contradicted the statement in the deed. Under these circumstances the evidence of the existence of a consideration was insufficient, and the conveyance must be treated as voluntary. Appeal dismissed with costs.

F. D. Davis, for plaintiff. *S. White*, for defendants.

Meredith, C.J., Rose, J.] CHRISTY *v.* ION SPECIALTY CO. [Feb. 14.

Pleading — Disclosing no reasonable answer — Striking out — Rule 261 — Amendment.

Appeal by the plaintiff from an order of Boyd, C., in Chambers, dismissing a motion by the plaintiff under Rule 261 to strike out paragraphs 13 and 14 of the statement of defence in an action to restrain the infringement of a patent for a bicycle saddle, on the ground that they disclosed no reasonable defence and were embarrassing. These paragraphs set up the invalidity of the first claim of the plaintiff's patent, and were, admittedly, an answer to the original statement of claim ; but the plaintiff had amended his statement of claim by omitting his assertions based upon the first claim in the patent, and the defendants did not amend their defence.

Held, that it was only in a very clear case that a pleading should be struck

out as showing no reasonable ground of action or defence, and it could not be said that this was manifestly such a case ; and it was also doubted whether a defence which was originally good could be struck out after the plaintiff had amended, and whether it was the duty of the defendant to amend. Appeal dismissed with costs to the defendant in any event.

Bristol, for the plaintiff. *W. Cassels*, Q.C., for the defendants.

Rose, J.] IN RE DOMINION COLD STORAGE CO. [Feb. 15.

LOWREY'S CASE

Execution—Order of court of another Province—Winding-up Act, R.S.C. c. 129, s. 85—Production of certified copy—Entry.

Execution may be issued under s. 85 of the Winding-up Act, R.S.C. c. 129, upon the order of a court of another Province, without making such order a rule of court, or obtaining the direction of a judge, but upon the mere production to the officer of the High Court of a properly certified copy of such order.

Re Companies Act and Hercules Insurance Co., 6 Ir. R. Eq. 207, followed. *Re Hollyford Copper Mining Co.*, L.R. 5 Ch. 93, and *Re City of Glasgow Bank*, 14 Ch. D. 628, followed.

In such cases the settled practice of the High Court is to have the order entered in the proper book as a judgment or order.

Masten, for D. Lowrey. *George Bell*, for liquidator.

Boyd, C., Robertson, J., Meredith, J. } THE QUEEN *v.* HAMMOND. [Feb. 17.

Criminal law—Evidence—Coroner's inquest—Canada Evidence Act, 1893—56 Vict., c. 31, s. 3.

Crown case reserved. The Canada Evidence Act, 1893, 56 Vict., c. 31, s. 3, enacts : "No person shall be excused from answering any question upon the ground that the answer to such question may tend to crimimate him. . . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceedings thereafter instituted against him other than a prosecution for perjury in giving such evidence. The evidence in this case was given before the coroner who had told the prisoner that "it was not necessary to be examined under oath without he wished to be so, and that any evidence taken might be used against him." The prisoner, however, said that he wished to give evidence and was sworn in the usual way, and gave evidence which was afterwards used to fix criminal liability upon him.

Held, (Meredith, J., dissentiente,) that the section applies to any evidence given by a person under oath, although he may not have claimed privilege.

Held, also, that as the Court of Appeal for criminal cases is now constituted the decision of the judges of one court is not binding on the judges sitting in another court of the same jurisdiction.

E. F. B. Johnston, Q.C., for prisoner. *J. R. Cartwright*, Q.C., for Crown.

Armour, C.J., Falconbridge, J.] SMITH *v.* BOYD. [Feb. 18.

Amendment—Pleadings—Trial—Partnership—Conspiracy—Accounts—Parties—Terms—Costs.

The action as framed was to recover damages for an alleged conspiracy between the defendants, the plaintiff's partner in a mercantile business and another, whereby they fraudulently and secretly withdrew money from the assets of the firm. The real grievance was the alleged misappropriation by the plaintiff's partner, with the assistance of the other defendant, of partnership funds to the injury of the partnership and of the plaintiff. At the trial the plaintiff sought to amend by alleging that moneys were received by the other defendant in trust for the firm, and by adding the firm's assignee for the benefit of creditors as a party, and by claiming an account.

Held, that the amendment should have been granted upon proper terms as to costs.

DuVernet, for plaintiff. *Delamere*, Q.C., for defendant Boyd. *H. S. Osler* for defendant Cooper.

COUNTY COURTS.

COUNTY OF YORK.

O'BRIEN *v.* TORONTO.

Municipal corporation—Negligence—Icy sidewalks—55 Vict., c. 42, s. 531—57 Vict., c. 50, s. 13—Granolithic pavement.

Held, that a municipal corporation has the right to select such material for sidewalks as in its discretion may think best, so long as it is a material which is generally used or adaptable for the purposes required, and the corporation is not liable for damages which may result, merely because such pavement becomes at any time so affected by natural causes, over which the corporation has no control, that more than ordinary caution is required by the public using such sidewalk to prevent accidents.

[TORONTO, 1897, MORGAN, J.J.

This was an action brought against the City of Toronto, for damages sustained by the plaintiff through the alleged negligence of the defendants.

The plaintiff while walking along a sidewalk in the City of Toronto slipped and fell violently, seriously injuring herself. It appeared that the sidewalk in question was a granolithic pavement, and had been in a slippery condition since the inception of the winter, that at the time of the accident it was covered with thin slippery ice, that the walk had been so covered for some five days prior to the accident.

At the close of the plaintiff's case the defendants moved for a non-suit.

A. Mills, for plaintiff.

J. S. Fullerton, Q.C., and *H. L. Drayton*, for defendants.

MORGAN, J.J.: I have felt for a long time the difficulty that must come up and must eventually be decided with respect to the icy and dangerous condition of foot pavements. The city is not bound to construct a foot pavement of any description, either wooden or otherwise. If in the absence

of a pavement the snow fell upon the earth as it stood in its original character and was tramped down by foot passengers, it is very doubtful whether there would be the same condition of dangerous slipperiness as is complained of here; and, presuming such condition existed, it is exceedingly doubtful whether, in the absence of an artificial sidewalk the city would be bound to interfere with conditions of slipperiness that nature has produced by frost or fallen snow upon the places where foot passengers ordinarily go.

But, it may be argued that if the city chooses to change the condition of the original earth by putting down some sort of improvement for the convenience of passengers, and that the presence of that improvement produces a higher degree of slipperiness than would exist in the absence of the improvement, that to that extent they must at all times take care, under all circumstances and climatic influences, to protect the public against a condition of affairs that would not have existed but for the improvement and if they had not interfered with existing conditions. One would properly regret that this should be the law, because the demands of civilization call for these foot pavement improvements, the convenience of the public calls for, they are all put there with the consensus of the public, they are all enjoyed by the public and the public would naturally object if these pavements were not put down, and the city is only yielding to a well appreciated and well understood public demand if these things are done. Then can it be said, when the corporation, in obedience to a public demand, makes these sidewalk improvements, and makes them of the best and most durable material that experience seems to suggest as the proper thing for sidewalks, and that when these sidewalks, affected by the forces of nature, uncontrollable by the city—namely, snow and frost—at times become very slippery, that the city is bound, all over these sidewalks, at all times and under all circumstances, to protect the public against a danger caused by the forces of nature? I do not think I can say so.

The Legislature has recently provided that in damage actions for injury through snow and ice on sidewalks gross negligence must be proved (57 Vict., c. 50, s. 13). I think that the intention of the Legislature was to disturb an existing state of the law as expressed in decided cases and produce a different state of the law, that state of the law being to relieve the city from responsibility in cases on all fours with this; and I think I must give effect to the legislation intended and hold that in cases of this description the city is not liable and that the plaintiff has not made out such a case as would bring her within the right to recover.

The action must be dismissed.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Jan. 11

BANQUE D'HOCHELAGA *v.* MARITIME RY. NEWS CO.

Partnership—Service of writ after dissolution.

Appeal from the decision of GRAHAM, J., at Chambers, deciding that service on one or more partners of a dissolved firm is good service on all the partners of the firm where plaintiff had no knowledge of the dissolution. On appeal to the Court :

Held, following the dictum of CHITTY, J., in *Shepherd* v. *Hirsch*, 45 Ch. Div., p. 244, that the service on one or more partners was good service on all partners, although the firm had been dissolved, if plaintiffs had no knowledge of the dissolution.

C. H. Cahan, for plaintiffs. *J. A. Chisholm*, contra.

Full Court.] WEATHERBEE *v.* WHITNEY. [Jan. 11.

Affidavit for capias—Lands sold—Action for price.

This was an appeal from an order made in chambers by RITCHIE, J., setting aside an order for arrest. The affidavit of the plaintiff upon which the order for arrest was made stated that he had sold to the defendant certain mining areas for a stated price, and a further paragraph in said affidavit set forth an agreement for the sale of said areas, and that the plaintiff had performed his part of the agreement, and that the price agreed upon was due from the defendant to the plaintiff. On the application before RITCHIE, J., the defendants produced affidavits contradicting all the material allegations in plaintiff's affidavit. On appeal

Held, that it appearing from the affidavits that the title to the mining areas had not passed from the plaintiff to the defendant, the plaintiff could maintain only an action for damages and not an action for the price : *Laird* v. *Pinn*, 2 M. & W. 474. Appeal dismissed with costs.

Ritchie, Q.C., and *J. A. Chisholm*, for plaintiff. *Ross*, Q.C., and *H. Mellish*, for defendant.

McDonald, C.J., Townshend, J. Graham, E. J. } PIPER *v.* KINGS' CURE CO. [Jan. 11.

Setting aside judgment for default of plea—Sufficiency of affidavit—Discretion of Judge—Defence sent by mail—Miscarriage of.

By agreement between solicitors defendant was allowed further time, expiring July 6th, 1897, for putting in the defence. On July 2nd, 1897, the defence was mailed to the agents of the defendant company's solicitors at Bridgetown, and in the ordinary course should have reached them in time to file and serve on the following day, but through a miscarriage in the mails did not reach them until after judgment had been entered for default of plea.

Application was made to the judge of the County Court to set aside the judgment so entered, and for leave to come in and defend. The only affidavit read in support of the application was that of defendant company's solicitor which contained the following paragraphs: (*a*) "The said defendant company have a good defence to this action, and unless the said judgment is opened up great injustice will be done the defendant company herein." (*b*) "The said plaintiff has no cause of action herein, as I am advised and believe, and the said defendant company are not indebted to the said plaintiff, as in said statement of claim alleged." (*c*) "As will appear by the defence herein the defendant company deny that they are indebted as alleged, and claim that the plaintiff did not on her part fulfill the conditions of the contract alleged to have been made, and which forms the ground of action herein." The judge of the County Court having granted the application the plaintiff appealed.

Before the passage of the Judicature Act (R.S. 4th series, c. 94 s. 75) a defendant seeking to set aside a judgmant entered for default of appearance and plea, was required by satisfactory affidavits to "account for his non-appearance, and disclose a defence upon the merits with the particulars thereof." Under the present practice by O. 27, R, 14, "Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge upon such terms as to costs or otherwise as such Court or a judge may think fit."

Held, that the affidavit made by defendant's solicitor who did not profess to have any personal knowledge, except as he was advised and believed, and who while referring to the proposed defence did not undertake to verify the particulars of it, was not sufficient to justify the County Court Judge in setting aside the judgment.

Held, also, that the affidavit was bad under O. 36, R. 4, as containing matter that the solicitor making it was not able of his own knowledge to prove, and not giving the grounds of his belief.

Per TOWNSHEND. J., MCDONALD, C.J., concurring, GRAHAM, E.J., dissenting that following English decisions on a rule in the same terms as O. 27, R. 14, nothing short of an affidavit showing merits would entitle the defendants to come in and defend, or would justify the Judge to whom the application was made in permitting them to do so.

W. E. Roscoe, Q.C., for appellant. *F. Mathers*, for respondent.

Full Court.] BURRIS *v.* RHIND. [Jan. 11.

Duress—Threats of criminal proceedings—Deed so obtained set aside.

The defendant, W.R., conveyed his farm to his sister C. as security for the sum of $450, advanced by her from time to time to assist him in paying off his obligations. The offer of the security was made in connection with a request for a further advance, which was given. Plaintiff, to whom W. R. was indebted, on learning of the conveyance of the land, saw W. R., and told him that the transaction was a fraudulent one, and that he had been guilty of a criminal offence, the punishment for which was the penitentiary, and threatened to take proceedings against him unless he at once took steps to procure a

eyance of the land. This conversation and the threats made were com-
ted to C. who was asked to sign and return a deed sent her reconveying
d to W. R. The deed was signed and returned in accordance with the
t, and plaintiff thereupon obtained from W. R. a mortgage of the land
re the debt due to him. Registration of the deed made by C. having
efused in consequence of an informality in the execution, it was returned
to be properly executed, but C., having obtained advice in the mean-
declined to re-execute the deed or to return it. In an action by plaintiff
over possession of the deed or for a declaration that the land was the
ty of W. R. at the time he gave the mortgage, the trial Judge found,
other things, (1) that W. R. requested C. to reconvey the property to
om fear of criminal consequences, which fears were the result of con-
on with plaintiff and one C., a solicitor, and that W. R. when he wrote
deed informed C. of his fear that he had made himself criminally
sible ; (2) that C., acting on the information conveyed to her by W. R.
nder the belief that he had made himself criminally responsible, executed
ed ; (3) that C. had no knowledge at the time that plaintiff intended to
e mortgage.

eld, that the case came within the class of cases where the Court will
de the transaction for pressure and undue influence.

eld, that plaintiff having requested W. R. to procure the re-conveyance,
W. R. his agent for that purpose, and that he could not repudiate such
y while seeking at the same time to have the advantage of the re-con-
ce procured by W. R. from C., and that C. was entitled to have such
veyance set aside with costs.

H. Bell, for defendant. *F. T. Congdon*, for plaintiff.

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ourt.] KIRKPATRICK *v.* MILLS. [Jan. 11.

- Evidence—Solicitor—Neglect to attend trial—New trial—Consent to educe verdict.

n the trial of an action for libel witnesses who had read the paper con-
g the libel were allowed to state to whom they thought the libel referred.

eld, that the evidence was admissible. At the opening of the term at
the case was set down for trial the jury cases were the first for trial, and
he Court met cases were set down for special days. Defendant's attorney
ot present at the time this was being done, nor was he represented by
el. In consequence, the cause was tried in defendant's absence, and
ent was given against him.

eld, that under these circumstances defendant was entitled to a new trial
desired it, but only upon payment of costs of the former trial and of
ent.

he facts as shown by the affidavits went to show that defendant admitted
ation of the libel, and had expressed his willingness to apologize there-
terms proposed by plaintiff's solicitors.

eld, that plaintiff would be entitled to a verdict, and that as he had agreed
uce the damages to a nominal amount the verdict should be allowed to
subject to such reduction.

F. T. Congdon, for appellant. *J. A. Chisholm*, for respondent.

Full Court.] DOMINION COAL CO. *v.* KINGSWELL STEAMSHIP CO. [Jan. 11.

Irregularity in service of summons—Waived by appearance—Appearance under protest—Waiver.

Defendant company's steamer was attached at the suit of plaintiff to respond such judgment as plaintiff might obtain in an action against the defendant for breach of the conditions of a charter party. Defendant appeared under protest and without prejudice to the right to object to the jurisdiction of the Court, and subsequently moved before GRAHAM, E. J., to set aside the summons and attachment on the ground that the service was irregular.

Held, affirming with costs the judgment dismissing the application that the defective service of a summons regularly issued and in proper form, is cured by the appearance of the defendant.

Held, also, that such a thing as appearance under protest is unknown to the practice of the Court, but that even if defendant's right to object to the legality of the service could be protected by protest the protest in this case was limited in terms to the jurisdiction.

Per GRAHAM, E.J., (in the judgment appealed from.)

Held, that if defendant company under protest had put in special bail under the statute and moved to set aside the attachment they could have done so, but when they obtained the release of the vessel by giving security, without notifying the other side that they reserved the right to move to set aside the process, they waived the right to do so.

C. P. Fullerton, for appellant. *H. Mellish*, for respondent.

Full Court.] COMMERCIAL BANK *v.* SCOTT. [Jan. 11.

Collections Act—Order made by Judge at Chambers for payment of money—Attachment to enforce order—Laches—Costs.

The Nova Scotia Collections Act, Acts of 1894, c. 4, s. 1, provides that "no person shall be arrested or imprisoned upon or in respect of any judgment of the Supreme Court . . . ordering or adjudging the payment of any money, unless as in this Act hereinafter provided." And s. 2 of the Act reads: "For the purposes of this Act the word judgment shall include any order directing payment of money, costs, charges, or expenses." An order having been made by a Judge at Chambers, directing defendant to pay over money in his hands to the receiver.

Held, that the order was one which could not be made, and was therefore, one which could not be enforced by attachment or imprisonment for disobedience thereto.

Defendant's counsel drew a distinction between an order made as the result of an action between the parties where it is adjudged or ordered that the defendant pay a certain amount of money, and the case of an order for payment of a particular sum of money found or admitted to be in the hands of the party against whom the order is made in the course of the litigation.

Held, that the distinction was well founded, and that the Collections Act did not cover such a case as the latter, but was intended to apply only to the case of a judgment debtor ordered to pay money in satisfaction of the judgment againt him.

Held, further, that inasmuch as defendant did not appear to show cause ainst the original order, before the judge at chambers, but stood by until the achment proceedings were taken, he was not entitled to costs.

W. B. A. Ritchie, Q.C., for plaintiff. *W. H. Fulton*, for defendant.

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ull Court.] FULTON *v.* KINGSTON VEHICLE CO. [Jan. 11.

ssignment executed under threat of criminal prosecution—Upheld as between original parties where there was a debt actually due—Case of third party distinguishable—Threat to do that which may lawfully be done not duress.

Plaintiffs sought to set aside an assignment and confession of judgment iven by plaintiff to defendant company on the ground that they were executed n consequence of a threat of criminal prosecution. It was shown that the efendant company had considered the question of plaintiff's arrest, and that warrant was actually issued for that purpose, and that proceedings would ave been taken in the event of his refusal to execute the documents required f him, but the jury found among other things that there was no agreement, xpress or implied, on the part of the company with plaintiff to abandon the criminal prosecution conditionally upon his giving the security demanded. The trial Judge, notwithstanding this finding, directed judgment to be entered for plaintiffs.

Held, 1. That he was wrong in so ordering, and that the judgment must be set aside with costs.

2. There being a debt actually due from F. to the defendant, that the security given was not invalidated by the fact that it was given in consequence of a threat to take criminal proceedings against him, there being at the same time no agreement on the part of defendant that if the security was given they would not prosecute.

3. That the case of a party seeking to evade payment of a debt actually due is distinguishable from the case of security given by a third party (*e.g.*, a relative) not a party to the original transaction.

4. That the threat made being only to do that which might lawfully be done there was no duress which would avoid the transaction.

H. A. Lovett, for appellant. *R. L. Borden*, Q.C., and *H. McKenzie*, for pondent.

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ll Court.] THE QUEEN *v.* GRANT. [Jan 11.

quor License Act—Third conviction—Power of magistrate to vary form prescribed—Amendment of summons in absence of defendant and without notice held bad—Costs.

Defendant was convicted by a stipendiary magistrate of a third offence gainst the provisions of the Liquor License Act of 1895 and amending Acts, nd was adjudged to pay a fine and costs, and, in default of payment, to be mprisoned for 90 days, and in addition to the term of imprisonment imposed n default of payment of the amount of the fine and costs, to be imprisoned for 50 days. A difficulty arose in connection with the carrying out of the punishment imposed, owing to the fact that neither of the forms of conviction

prescribed for use contained words authorizing an absolute term of imprisonment in addition to that provided for in case of default of payment of the amount of fine and costs. The penalties were clearly defined, the jurisdiction complete, and the object of the Act certain.

Held, that the magistrate was justified in adopting a form of conviction made applicable to a different section of the Act.

After hearing the evidence and the arguments of counsel the stipendiary magistrate adjourned the case to a future day for the sole purpose of deciding as to the sufficiency of the evidence and giving judgment in the case. On the day fixed, in the absence of the defendant or his solicitor, and without notice to them, he heard a motion to amend the summons by changing the date of the previous conviction, and after making the amendment asked for, convicted the defendant.

Held, (MEAGHER, J., dissenting) that the stipendiary magistrate could not make this amendment in the absence of defendant and without notice, and that the appeal should be allowed and the conviction quashed with costs on that ground.

A. Drysdale, Q.C., for appellant. *E. C. Gregory*, for respondent.

Full Court.] RUDOLF *v.* BRITISH AND FOREIGN MARINE INS. CO. [Jan. 11.

Marine Insurance—Partial loss on cargo—Evidence of stranding of vessel.

The schooner "Donzella," on a voyage from Porto Rico to Halifax, put into Barrington for shelter. The wind at the time was south-east, with a heavy snow storm prevailing. The vessel was anchored near the light ship, with one anchor out, but as the wind increased a second anchor was put out. Subsequently during a heavy gale that sprang up from the north-west both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from the shore. Sometime afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and the cargo was considerably damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet off forward under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less, and pieces off of it. The main keel was broomed up The flying jib boom and main boom were broken, and the fore boom was split.

Held, dismissing with costs the motion for a new trial, that there was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore and beating on the rocks for some time, and on which they could properly find a verdict for plaintiff, and that the trial judge was right under the circumstances in not withdrawing the case from the jury.

R. E. Harris, Q.C., and *W. A. Henry*, for appellant. *A. Drysdale*, Q.C., for respondent.

urt.] FILLIS *v.* CONROD. [Jan. 11.

County Court—Ex parte judgment set aside—Costs.

26, c. 9, Acts of 1889, enacts that "the pleadings, practice, process, nd procedure of the Supreme Court for the time being, as embodied in licature Act and amendments thereof, and the orders and rules therein force . . . shall apply to and extend to the County Court . . . as the same may be modified and limited by this Act." S. 54 provides . . . if any cause when called is not tried, either party shall be at to move the Court on the last day of said term . . . that the judg- elow be affirmed or reversed as the case may be, with costs . . ." peal from the decision of the Stipendiary Magistrate in favor of defen- lefendant was not present when the case was called for trial in the Court, and plaintiff called witnesses and took judgment ex parte.

eld, that the practice of the Supreme Court, which otherwise would have pplicable was modified in this case by the provision contained in s. 54, at under that section it was the duty of plaintiff to have moved on the y of term.

he County Court Judge having refused to set aside the judgment for ff,

eld, that he was wrong in doing so, and that the judgment must be set but, as plaintiff undertook to try the cause on the merits, that no costs appeal should be allowed except the cost of printing; defendant's costs summons to be costs in the cause.

R. Rowlings, for appellant. *E. D. King*, Q.C., for respondent.

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urt.] WRIGHT *v.* POLSON. [Jan. 11.

ct—Mutual and independent promises—Non-performance no defence— medy in damages.

aintiff and defendant entered into a contract in writing, under which ff undertook to excavate a cellar on land owned by defendant, and to do other work in connection therewith at prices named in the contract, fendant, on his part, undertook to pay plaintiff for the work by crediting l sum of money due him by plaintiff, by delivering to plaintiff two wag- ubject to certain alterations to be made in them, by doing the wood f a light truck waggon for plaintiff, amounting in all to $188.75, and ing the balance, if any, in cash. It was stipulated that the work to be y plaintiff was to be finished by November 1st, 1896. Plaintiff brought ion for the amount due him according to the prices fixed, alleging that lant refused to deliver the waggons, or to do the work on his part agreed done. The defence was that plaintiff had neglected to complete the referred to in the contract, and on his part agreed to be done. The evi- showed that the sum of $15 would remove the defects complained of by lant, and that in other respects plaintiff had substantially fulfilled his ct.

eld, that the promises made by the parties to the contract were mutual dependent, that it was no defence for defendant to set up non-performance

on the part of plaintiff, and that both parties must be taken to have relied upon his remedy in damages.

Held, also, that as defendant had counter-claimed damages, and could be fully compensated in that way, and admitted that the sum of $15 would cover the defects alleged, plaintiff was entitled to have judgment entered in his favour for the amount of his claim, subject to that reduction, and to have his appeal allowed with costs.

H. Mellish, for appellant. *D. C. Fraser*, for respondent.

Full Court.] ALEXANDER *v.* BAKER. [Jan. 11.

Setting cause down for trial before Judge at Chambers—Order must prevail until set aside—Application to set aside judgment.

At the instance of plaintiff and after due notice to defendant's solicitor, who was present when the application was made and made no objection thereto, the cause was set down for trial before a Judge at Chambers.

Held, that the order, being clearly within the jurisdiction of the Judge who made it, must prevail until set aside, and was not affected by the subsequent giving of a jury notice by defendant.

Defendant's counsel appeared at the trial and while objecting that the trial could not be proceeded with on account of the giving of the jury notice, went on with the trial and cross-examined plaintiff's witnesses, and called witnesses on behalf of defendant.

Held, that having taken his chances on the trial he had no merits upon which he could ask to have the judgment against him set aside.

Held, that the judgment of the Chambers Judge must be affirmed and defendant's appeal dismissed with costs.

Sugg v. *Selber*, 1 Q.B.D. 362, distinguished.

D. McNeil, Q.C., for appellant. *C. S. Harrington*, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] COLE *v.* MCDONALD. [Feb. 4.

Constable appearing in Justices' Courts—Presentment of note—Sec. 4 of Justices' Court Act directory.

A constable appeared for the plaintiff on the return of a summons in a Justices' Civil Court and applied for an adjournment, which was granted, on account of the absence of the plaintiff, who was a necessary and material witness in his own behalf.

Held, (1.) that a judgment signed at the adjourned court for the plaintiff was bad, and that a non-suit should be entered. (2.) That s. 4 of the Justice's Civil Court Act providing that the Justice "shall read over to each witness

dence given by him, and the witness shall subscribe his name thereto," tory, and that the fact that the Justice's return for review does not hat the evidence has been so read over to each witness, is not a ground ing aside the judgment. (3.) That in the case of a note payable at a lar place, presentment at that place must be proved under s. 86 of the f Exchange Act to entitle the plaintiff to judgment, and that the stamp Bank where the note was payable with the date of presentation was no ce of presentment.

on-suit ordered on first two grounds.

S. Crocket, for defendant.

his over-rules the judgment of the Chief Justice in *Ackerman* v. *ugall*, reported in 33 C.L.J., 406.

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ourt.] BOYER *v.* BOYER. [Feb. 4.

of Woodstock Civil Court—Plaintiff may abandon at trial so as to give risdiction.

eld (VANWART, J., dissenting), that the right of abandonment so as to a claim within the jurisdiction of the Town of Woodstock Civil Court e exercised after the issue of the summons, and at the trial.

B. Connell, Q.C., for plaintiff. *W. P. Jones*, for defendant.

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ourt.] EX PARTE GORMAN. [Feb. 4.

a Temperance Act—Magistrate a ratepayer of town into whose trea- ry fines are payable.

eld (HARRINGTON, J., dissenting, and LANDRY, J., dubitante), that the diary magistrate of the Town of Moncton is not disqualified from try - mplaints for offences against the Canada Temperance Act by reason of ng a ratepayer of the town into whose treasury the fines collected under t are payable.

x parte Driscoll, 27 N.B.R. 216, followed, and *Town of Moncton* v. , decided Dec. 1897, but not yet reported, overruled.

ule nisi for certiorari discharged.

. C. Hanington and *D. Grant*, in support of rule. *D. I. Welch* and *Chandler*, contra.

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ourt.] EX PARTE GALLAGHER. [Feb. 4.

ada Temperance Act—Qui tam action against magistrate

eld, that the fact that a qui tam action was pending against the convict- agistrate in a C.T.A. case at the suit of the defendant was a ground of alification. Rule absolute for certiorari.

. C. Hanington, and *D. Grant*, in support of rule. *D. I. Welch*, and *. Chandler*, contra.

Full Court.] MACPHERSON *v.* MILLER. [Feb. 9.

Agreement on sale of personal property that title shall remain in vendor until purchase price is paid.

Held, that an agreement taken by the respondent on the sale of a wagon providing that its title and ownership should remain in him until promissory notes taken for the purchase price should be paid in full was valid, and did not require to be registered under the Bill of Sale Act to hold the property against the appellant, who had seized it under a bill of sale subsequently executed to him by the purchaser. Appeal dismissed.

C. E. Duffy, for appellant. *O. S. Crocket*, for respondent.

Province of Prince Edward Island.

SUPREME COURT.

Hodgson, J., In Chambers. } EX PARTE TAYLOR. [Feb. 11.

Habeas Corpus—Fisheries Act—Illegal warrant of commitment—Jurisdiction.

Application on a writ of habeas corpus. In November last the applicant was convicted of an infraction of the Fisheries Act before the agent of the Marine and Fisheries Department. The applicant paid the costs of prosecution and was allowed to go at large till a few days before this application when he was arrested on a warrant issued in pursuance of the above conviction. The warrant recited the fact that the applicant had been convicted of an infraction of the Fisheries Act, but did not state that the Fishery Agent had adjudicated on the matter of imprisonment.

Held, that as the warrant did not set forth that the Fishery agent had adjudicated on the matter of imprisonment it did not show jurisdiction to direct imprisonment and was therefore void. Applicant discharged from custody.

W. S. Stewart, Q.C., for applicant. *D. A. McKinnon*, for Fishery Department.

Province of Manitoba.

QUEEN'S BENCH.

Taylor, C.J.] ABELL *v.* CRAIG. [Jan. 31.

Appeal from County Court—Leave to appeal—Striking out—County Courts Act, ss. 321, 326, 327, 328, 59 Vict. (M.) c. 3, s. 2—Queen's Bench Act, 1895, Rule 168 (b).

Motion under Rule 168 (b) of "The Queen's Bench Act, 1895," to strike out an appeal by the plaintiffs from a County Court decision, on the ground that the appellants had failed to comply with 59 Vict., c. 3, s. 317, which

es an appellant to file in the County Court an affidavit stating his bona tention to appeal within ten days after the decision complained of is or made. It appeared that such failure had been entirely owing to the t of the County Court Clerk to notify the plaintiff's attorney of the deci- hen he received notice of it from the judge ; that the day after the ey received the clerk's letter informing him of the decision he sent the it of intention to appeal required by the statute, and that all other steps appeal had been regularly taken.

eld, that under s.s. 326, 327 of County Courts Act, as amended by 59 c. 3, s. 2, a Judge of the Queen's Bench has power, on the motion to out, to give the appellant liberty to proceed with his appeal, notwith- ng the failure to comply with any requirement of the statute, and that eave should be given in the present case, but only on payment of the of the motion, as the defendant had made it in good faith, and in ignor- f the special circumstances.

eld, also, that it was not necessary on entering the appeal with the onotary to produce to him evidence that the appellant had furnished the ty for costs of the appeal required by s. 321 of "The County Courts as amended by 59 Vict., c. 3, s. 2, although it may be a reasonable and nt thing to do.

lathers, for plaintiff. *Pitblado*, for defendant.

OR, C.J.] RE ROBERT DUNN. [Jan. 31.

ale—Expropriation Act, R.S.M., c. 56—Assessment Act, R.S.M., c. 101.

Application by Robert Dunn for payment out of court of a sum of money n by the Provincial Government on taking under the Expropriation Act, I., c. 56, a parcel of land for the purposes of a Home for Incurables. had, in June, 1893, bought the lot at a tax sale for $3, paying in cash being the amount of the taxes and costs, and leaving a balance of $1.58 he should have paid within two months after the expiration of the time ed the owner for redemption, or else, under s. 168 of the Assessment R.S.M., c. 101, he forfeited all claim to the land purchased and to the y already paid. The Government expropriated the land after the tax ut within the two years allowed for redemption. The owner did not m ; but there was no evidence that Dunn had paid the balance of his pur- money.

Held, that the applicant had now no interest in the land or in the money rt which stood in place of the land, and that his application must be d.

McKercher, for applicant.

J.] KELLY *v.* WINNIPEG. [Jan. 21.

icipality—Ultra vires—By-law fixing minimum rate of wages for work- nen employed by corporation.

The Council of the City of Winnipeg in 1895 passed a resolution provid- or payment of a minimum rate of 17½ cents per hour to all workmen or ers employed in any work by the city, or on any contracts for the city

and, having acted upon it ever since, proposed to maintain the same policy, when the plaintiff, one of the ratepayers, commenced this action for an injunction to restrain the City Council from continuing to enforce the resolution, alleging that competent laborers could be engaged for 15 cents per hour, and that the council had no right to spend the ratepayers' money thus extravagantly and unnecessarily, and moved for an interim order.

Affidavits were filed on behalf of defendants tending to show that 17½ cents per hour was not more than a fair living rate of wages in Winnipeg, and that it was not in the interest of the city to have a large number of its people employed at less than a fair living wage, even if the work would thereby cost the city less.

Held, that the matter in dispute appeared to be a question of policy in the city government, as to the expediency of which the ratepayers and not the court should pronounce; more especially as the resolution had been acted upon by three successive councils, and there had been several opportunities for the electors to express their opinions upon such policy, if they had disapproved of it; and that the application should be dismissed. Costs reserved until the hearing.

Tupper, Q.C., and *Phippen*, for plaintiff. *Ewart*, Q.C., and *J. Campbell*, for defendants.

Book Reviews.

The Dominion Law Index (1867-1897), 2nd edition, by HARRIS H. BLIGH, Q.C., Librarian of the Supreme Court of Canada, and WALTER TODD, of the Private Bills Department, House of Commons, Ottawa. Toronto: The Canada Law Journal Co., 1898.

The first edition of this work appeared in 1891, and met with a decided success, filling the long-felt want of an index to federal legislation since the British North America Act. The present edition is much enlarged and improved, and constitutes a most comprehensive and systematically arranged index, not only of all the legislation of the Dominion, repealed and unrepealed, public and private, but of such Imperial statutes, treaties, and orders-in-council as affect Canada. The Criminal Code has received special attention, and has been indexed so thoroughly in this work that it is thought to be not possible that a seeker should fail to make a satisfactory search, whether he directs himself to the most commonly accepted subject title concerned, or to a more obscure collateral heading. The material thus indexed embraces 81 volumes, and must have necessitated a most laborious and painstaking preparation by the authors. The typographical arrangement of the book is excellent, and we have no doubt that the profession will welcome it as a time-saving device, the use of which will in a short time save any one many times its price.

Index to the Railway Act of Canada and amending Acts, by WALTER VAUGHAN, Esq., late of the law department of the Canadian Pacific Railway Co. Toronto, 1898: The Canada Law Journal Co.

Mr. Vaughan's admirable index is compiled and published at the request

yers engaged in railway law practice, who find it necessary to refer con- to the "Railway Act." The Act itself, 51 Vict. (D.), c. 29, has been ed seven times, and the resulting complication of enactments has made cult to readily ascertain what the statutory rights and liabilities may be t a guide such as the present index. The compiler's connection with ge railway corporation mentioned should be a sufficient guarantee of curacy of the index, and that the work has been completed in a manner will be found satisfactory to all concerned in railway law.

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lements of Mercantile Law, by T. M. STEVENS, D.C.L., Barrister-at-aw. Second edition. London: Butterworth & Co., 7 Fleet st. 1897.
here is no better introduction to the study of the mercantile law than ook. It is largely used by students, and the style is easy and interesting, e arrangement of that orderly character which enables the reader to easily remember what is read. We should recommend this book as a addition to the Law School curriculum.

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mpendium of the Law Relating to Executors and Admistrators, by . GREGORY WALKER, B.A., and EDGAR J. ELGOOD, B.C.L., M.A., both Lincoln's Inn. Barristers-at-Law. Third edition, by EDGAR J. Elgood, .C.L., M.A. London: Stevens & Haynes, Bell Yard, Temple Bar, 97, pp. 445. Price. $5.25.
he previous edition was published in 1888, since which period a large r of cases bearing on the subject have been decided. This compen- is so well known, and is recognized as such a useful treatise on the law cutors, that it is unnecessary to say more than that this last edition eeps up the character of the previous ones, both as to the matter therein ned and as to the work of the printer and publisher.

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aw of Libel and Slander in Civil and Criminal cases, by MARTIN L. EWELL, counsellor at law. Second edition. Chicago: Callaghan & o., 1898; pp. 1025. Price, $6.
his is one of the standard books in the United States on this subject. sections have been added upon the subjects of restraining the publica- f libels by injunction, new trials for inadequacy of damages and the cation of libels by letters, telegrams, postal cards, etc. The construction e work is to give definitions and propositions, illustrated by cases which a full and well arranged digest of all the leading English and American rities bearing upon the section. Not only are these cases largely cited, any Ontario cases are also referred to. This arrangement of the matter t which is now being largely adopted as being found the most useful to who desire to ascertain the drift of the authorities with the least possible nditure of time.

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eatise upon the Law affecting Solicitors of the Supreme Court, with vari- ous appendices, by ARTHUR P. POLEY, B.A. of the Inner Temple, Barrister-at-law. London: William Clowes & Sons, limited, 27 Fleet street. 1897; pp. 700. Price, $5.25.
The author's preface is of the briefest. He has apparently confidence

that the contents of the book will not only sufficiently explain its raison d'etre, but justify its publication, and they do both. A portion of the matter is necessarily not applicable to this country, but the large amount of information given on subjects which are of interest, and the exceedingly clear, concise and exhaustive treatment of the subject, cannot be too highly commended. The volume is divided into nine books, covering: The admission and qualification of solicitors—Their rights and privileges, and herein of unqualified practitioners—The jurisdiction of courts over solicitors as officers thereof—Retainers—Remuneration—Liens—Delivery and taxation of bills—Recovery of Costs and Relations of Solicitors inter se, including partnership and agency.

The appendices which contain the Acts and Regulations as to Solicitors in England, and their admission to practice, are inapplicable in this country, but are useful for reference and comparison.

Engineering and Architectural Jurisprudence, a presentation of the law of construction for engineers, architects, contractors, builders, public officers and attorneys-at-law, by JOHN CAPE WAIT, M.S E., LL.B. John Wiley & Son, New York, 1898. $6.

Mr. Wait, who is also a lawyer, was, in 1887, instructor of engineering at Harvard University. In this very useful book he does for the engineer and architect that which Taylor and others have done for the medical profession. It would not be strictly accurate to say that there is no work on architectural jurisprudence, but for all practical purposes this is so, and this text book therefore supplies a felt want. Not only has the engineer's and architect's field of practice been largely extended of late years, but the practising lawyer must in these days, if he desires to be efficient, have a better knowledge of details connected with the departments covered by the various branches of business touched upon in this book than was requisite formerly. Lawyers are not usually as familiar with the difficulties and dangers attending construction work, or the methods employed, as they should be for their clients' protection. The information given by Mr. Wait puts them in a position to acquire a store of knowledge which would be otherwise unattainable without enormous labour. The extent of the author's research is evidenced by the fact that the book contains over 900 pages of extra width and size, which would be sufficient to make an ordinary volume of at least 1,200 pages, and he refers to nearly 5,000 cases. The book is divided into four parts, with numerous sub-divisions, so arranged as to give a very understandable and easily obtainable knowledge of the matters discussed under each heading. These parts are as follows: 1. Law of Contracts in general, illustrated and explained throughout by engineering and architectural cases. 2. Bids and bidders, their rights and liabilities. 3. A construction contract, its phraseology, terms, conditions, stipulations and requirements, their interpretation and force. 4. The employment of engineers and architects, their duties and responsibilities.

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We regret to record the death of Chief Justice Davie of Province of British Columbia. Having been born in rch, 1852, he was in the prime of life, a young man for high a position. It was thought that he had many years usefulness before him, but he had been in bad health for he time, and the end was not entirely unexpected. Mr. vie was called to the Bar in 1877. He was elected to the gislative Assembly in 1882, and in 1891 became Premier of tish Columbia. He retired from politics in 1895, and succeded Sir Matthew Baillie Begbie as Chief Justice of the preme Court of that province.

Sir Herbert Stephen, Barrister-at-Law and Clerk of Assize the Northern Circuit in England, has recently written on e subject of Prisoners on oath, present and future. He gues strongly and well against the proposal that all priners should be allowed to give evidence on their own behalf. His contention is that, under the proposed system, number of innocent persons will be convicted, and it is is opinion that even at present several innocent prisoners re annually convicted on the Northern Circuit alone, in conequence of giving evidence themselves. His views apparntly coincide with those of Mr. E. F. B. Johnston, Q.C., who ecently wrote an able article in these columns (33 C.L.J., . 667) under the caption "The prisoner as a witness," and e lays it down as a general rule, subject of course to all ust exceptions, that the accused should never be put in the vitness box. These views expressed by two gentlemen so minently qualified to give an opinion on this subject, one in England and one in Canada, must carry great weight.

ASSIMILATION OF PROVINCIAL LAWS.

As we have on a former occasion pointed out, The Confederation Act expressly contemplates this assimilation of Provincial laws in the English-speaking Provinces, but this is a sphere of legislation in which as yet, during the 30 years which have elapsed since Confederation took effect, practically nothing has been done. The statesmen of the past may, perhaps, be excused the neglect with which they have treated this subject. They have had a new constitution to mould and put into working order, and may have thought that any such scheme as the assimilation of Provincial laws, might very well be allowed to wait "a more convenient season." But the question is deserving of consideration whether the time has not now arrived when the serious attention of practical statesmen ought not to be turned to this subject and a scheme evolved for carrying it into effect.

The method by which the Confederation Act proposes to bring about a uniformity of law in the Provinces of Ontario, New Brunswick and Nova Scotia, is for the Dominion Parliament to pass an Act making provision for the uniformity of all or any of the laws in those Provinces relative to property, or civil rights, and of the procedure of all or any of the courts in those three provinces, "and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall notwithstanding anything in this Act, be unrestricted," but any Act of the Dominion making provision for such uniformity of law is not to have any effect in any Province until adopted by the Local Legislature thereof. See B.N.A. Act, s. 94.

The effect of this provision seems to be that if a Province were once to adopt a Dominion Act making provision for the uniformity of law on any particular subject, the power of legislation on that particular branch of law would thereafter be forever transferred from the Local to the Dominion Parliament. It is possible that the jealousy of any interference with the Provincial powers of legislation which undoubtedly

may make this section a dead letter, but any benefit might accrue from its adoption might to a large t, we believe, be secured by the Provinces themselves, ut forfeiting any legislative power whatever. But it is us in order to attain this end, some sort of concert have to be established between the various Provinces, nough it would be impossible by this means to insure ute uniformity of action, yet it might be possible to e a very practical and subtantial uniformity in a great matters, without any interference or legislation by the nion Parliament.

he main question to be considered is whether a uni- ty of law is desirable. If it is desirable then it is not hard to believe that some effective means could be ed for attaining that end.

erhaps it would be too much to expect that the whole of law should be attempted to be dealt with at once, t might be more prudent to attempt to bring about an d in some one particular department at a time. In order he best system for general adoption might be secured, it l probably be necessary to have some sort of consulta- body established, having the confidence of all the nces, to whom should be delegated the duty of preparing measures as, on a comparative view of the laws at nt in force in the various Provinces, might be deemed to be recommended for general adoption.

'OBITER DICTA.'

fter following the newspaper reports of the solemn farce has just been enacted in France over the trial for crimi- ibel of Messieurs Zola and Perrieux, we who are gov- d by English law—so often stigmatized as the perfection nreason—will read with a keener sense of appreciation ever before, the encomium of that great and wise French- , De Tocqueville, upon our juridical system: "Look at land, whose administrative laws still at the present day

appear so much more complicated, more anomalous, more irregular than those of France! Yet there is not a country in the world in which, in the days of Blackstone, the great ends of justice were more completely attained than in England; that is to say, no country in which every man, whatever his condition of life—whether he appeared in court as a common individual or a prince—was more sure of being heard, or found in the tribunals of his country better guaranties for the defence of his property, his liberty, and his life."

* * *

It appears from the February number of the *Law Magazine and Review* (p. 143) that some of the English County Court Judges are given to even more slovenly methods in determining cases before them than their Canadian brethren. In an action (before His Honour Judge Selfe, in the Deal County Court) for damages for the killing of a dog of larcenous propensities, by means of a spring gun, the defendant contended that the gun had been set on the supposition that the marauder was a fox, and that the setting up of a "gun or trap" for the correction of such quadrupedal "vermin" was perfectly legal—quoting "Addison on Torts" (7th ed. 143) in support of this view. Fortunately, however, counsel for plaintiff referred His Honour to the statute in such case made and provided, where the words were found to be "gin or trap." His Honour in pronouncing judgment said the case had been the means of discovering a very serious misprint, which if not brought to light, might have led him to give a different decision to what he would now pronounce," and he awarded the plaintiff £5 and costs. Our Canadian County Court Judges, with a few brilliant exceptions, are often remiss in the matter of research, but we believe there are very few of them who would accept a text-book version of a statute as final and authoritative. Our own limited experience has taught us that errors in the average legal text-book stand "thick as leaves in Vallombrosa;" and, while admitting in this connection the truth of the adage: "Humanum est errare," we are

say that the peccable quality in text-writers is quite uman—indeed we are not sure but what *in*human is per word for it.

* * *

The Auer Incandescent Light Mfg. Co. (Limited) v. *Dreschel* he Exchequer Court decided a question in our patent hich was theretofore res integra. The case turned he meaning of the following clause in section 8 of the Act: "Under any circumstances if a foreign patent the Canadian patent shall expire at the earliest date ch any foreign patent for the same invention expires." dge, J., holds that the expression "any foreign patent" be limited to foreign patents in existence when the ian patent was granted.

* * *

s commonly believed that the wig, bands and gown onstituted the forensic habit of the legal profession in nd from time immemorial, but the fact is they came ogue at a comparatively recent date. The white linen are a survival of the prevailing fashion amongst gen- at the time of the Commonwealth. The short wig from the Restoration; and "thus it happens," says derwick (*The King's Peace*, p. 200), "that by a very per- of conservatism, that head-dress, which in the seven- century was worn alike by kings and courtiers, by men and soldiers, by Jeffreys on the bench, and by Oates in the dock, has become in the nineteenth cen- he distinct characteristic of the advocate and judge." derwick is also of the opinion that it was not until the e of the reign of King Charles I. that counsel under nk of serjeant took to wearing silk or stuff gowns, and became "gentlemen of the long robe." Until the reign mes I. the Bar in general seems to have had no official me. The scarlet robes of the judges appear to date a very much earlier period, and do not owe their origin gland. An old painting of the trial of Savonarola, in

1495, represents the judges in robes of scarlet. The stern old Puritans objected to the judges "painting the town red" when they came on assize in their rubious toggery, and petitions were presented to the Protector, requesting that his judiciary should no longer be permitted to "affright the country with their blood-red robes, and their state and pomp." Richard II. prescribed a judicial costume of green, but because the judges regarded this colour as equivocal in its symbolism, or for some reason not appearing of record, it did not remain long in vogue. If it were to be revived, however, it could be worn with excellent effect by some judges of our own times. That learned lawyer, Mr. Augustine Birrell, Q.C., says somewhere, in a vein somewhat reminiscent of *Sartor Resartus*, that "there is a great deal of relativity in a dress-suit." We ourselves would fain trespass so far upon the philosophic domain of Herr Teufelsdrockh, as to remark that there has always been a deal of *subjectivity* in the vestments of the Bench.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

ARBITRATION—STATEMENT OF CASE BY ARBITRATOR—REFUSAL OF ARBITRATOR TO STATE CASE—SETTING ASIDE AWARD - ARBITRATOR, DUTY OF—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49) SS. 10, 11, 19—(R.S.O. C. 62, SS. 11, 12, 41.)

In re Palmer (1898) 1 Q.B. 131, an application was made to the Court to set aside an award on the ground that the arbitrators had refused to state a case, as requested by the applicant. Day, J., granted the application and his order was affirmed with a slight variation by the Court of Appeal (Lindley, M.R., and Chitty, L.J.), that Court holding that s. 19 (41 of Ont. Act) impliedly confers on a party to an arbitration, the right at any stage of the proceedings to apply to the Court for an order directing the arbitrator to state in the

n of a special case any question of law arising in the rse of a reference; and where an application is made bona to the abitrator to state a case, or give the applicant an ortunity to apply to the Court for such an order, it is such conduct on the part of the arbitrator to refuse as will ify the Court in setting aside the award, and remitting the ter to the arbitrator for reconsideration. And the eriality of the question of law depending on a question of , the arbitrators were directed if they found the question act in a certain way, then to state the case on the ques- of law as asked.

MINAL LAW—LIMITATION OF TIME FOR COMMENCING PROSECUTION—COMMITTAL FOR RAPE, TRIAL FOR MISDEMEANOUR—(CR. CODE, S. 551.)

In *The Queen* v. *West* (1898) 1 Q.B. 174, the prisoner was mitted for trial for rape within the period allowed for mencing a prosecution for that offence, and also within time for commencing a prosecution for unlawfully having nal intercourse with a girl between the ages of thirteen l sixteen. By the English criminal law a person on an ictment for rape may be convicted of the lesser offence. e depositions taken on the preliminary examination showing at the charge of rape could not be maintained, an indictment the lesser offence was found by the grand jury, upon which e prisoner was tried and convicted. The trial took place ter the time for commencing a prosecution for the lesser fence would have expired, but the Court for Crown Cases eserved (Lord Russell, C.J., and Hawkins, Mathew, Granam and Darling, JJ.) held that the prosecution was in time d affirmed the conviction. If, however, it had not been ossible on an indictment for rape to have convicted for the isdemeanour, it is possible the decision might have been herwise. We do not observe any provision in the Criminal ode authorizing a prisoner indicted for rape to be convicted illicit intercourse.

VIDENCE—CRIMINAL LAW—PROOF OF AGE OF CHILD.

In *The Queen* v. *Cox* (1898) 1 Q.B. 179, the only point iscussed is as to the sufficiency of certain evidence. The

point to be proved was that certain children were under sixteen. Evidence was given by two persous who had seen the children, and who stated what they believed were their respective ages, all of them being under sixteen; and also by a school mistress, who said the children attended a public elementary school, and she believed they were under sixteen. Counsel for the prisoner contended that proof of age could only be given by production of a certificate of birth and evidence of identity; but the Court (Lord Russell, C.J., and Hawkins, Mathew, Grantham and Darling, JJ.) held that there was no such rule of evidence, and that the evidence tendered was sufficient to be left to the jury, and the conviction of the prisoner was accordingly affirmed.

CONSPIRACY—COMBINATION TO INDUCE A PERSON NOT TO EMPLOY ANOTHER.

Huttley v. *Simmons* (1898) 1 Q.B. 181 is a case which follows *Allen* v *Flood* (1898) A. C. 1 (noted *post*), but in this case the element of conspiracy was also in question, which was not involved in *Allen* v. *Flood*. The plaintiff was a cab driver, and the defendants were members of a trades union, and the plaintiff complained that the defendants had maliciously conspired together and with others, to induce and had induced one Young not to employ the plaintiff. Darling, J., was of opinion that the defendants could only be liable for damages for conspiracy if the acts done or conspired to be done, would apart from any preconcert, have involved civil injury to the plaintiff; and that according to *Allen* v. *Flood* the inducing of one person not to employ another involves no civil injury, and therefore the defendants by conspiring to do such an act, incurred no liability.

EXECUTOR—INTERMEDDLING BEFORE PROBATE—EXECUTOR DE SON TORT.

The Attorney-General v. *New York Breweries Co.* (1898) 1 Q.B. 205, may be briefly noticed, as it incidentally determines that where an executor before probate procures himself to be registered as the holder of shares owned by the deceased, as his executor, that is such an intermeddling with the estate as will constitute him an executor *de son tort*, and as such liable to pay probate duties.

TIME LAW—CHARTER PARTY—GENERAL WORDS—EJUSDEM GENERIS.

re Richardsons (1898) 1 Q.B. 261 is an instance of the ation by the Court of Appeal (Smith, Rigby, and s, L.JJ.) of the doctrine of ejusdem generis in the con- ion of a charter party. The action was for damages for in loading a vessel. The charter party provided that s caused inter alia "by strikes, lock-outs, accidents to ay," and also "other causes beyond the charterer's con- were excepted. A railway communicating with the of lading was injured by a flood, and goods could not be ght down, and in consequence defendant's men were dis- ed for want of employment. After the arrival of the n port the railway was repaired, and goods arrived in ient quantity to load the vessel, but the defendants could et the necessary workmen. The court held that the al words "or other causes beyond the charterer's control," controlled by the previous specific words, and only ed to matters ejusdem generis with them, and that the in loading the ship could not be attributed to accident e railway or anything ejusdem generis with a lock-out n was confined to a dismissal of workmen in consequence trade dispute.

OF EXCHANGE — PROTEST — NOTICE OF DISHONOUR — BANK WITH VERAL BRANCHES—NOTICE TO WRONG BRANCH.

ielding v. *Corry* (1898) 1 Q.B., 268 was an action on a bill xchange in which a defendant, one of the indorsers, ed to be discharged by reason of want of proper notice of nour not having been duly given to a subsequent indorser. ill was put into the Cardiff branch of the Gloucester for collection, and forwarded by that branch to the on and Westminster Bank, who presented it on Saturday Nov. The bill was dishonoured and on Monday a e of protest was sent by mistake to the Cirencester ch of the Gloucester Bank. On the following day the ake was discovered, and notice of dishonour was tele- hed to the Cardiff branch, and all other indorsers, in- ng the defendant, were notified in due time. Smith and y, L.JJ., were of opinion that the notice to the Bank sufficient, but Collins, L.J., dissented.

LANDLORD AND TENANT—COVENANT TO REPAIR—NOTICE OF BREACH —FORFEITURE—RE-ENTRY—RENT FALLING DUE, AFTER NOTICE OF BREACH OF COVENANT TO REPAIR—ACTION FOR RENT AND POSSESSION—CONVEYANCING ACT, 1881 (44 & 45 VICT., C. 41) S. 14, S.-S. 1, (R.S.O. (1897) C. 170, S. 13, S.-S. 1).

Penton v. *Barnett* (1898) 1 Q.B. 276 was an action by a landlord against his tenant to recover possession of the demised premises for breach of a covenant to repair. Notice of the breach had been duly served on the tenant under the Conveyancing Act, 1881 (see R.S.O. (1887) c. 143, s. 11) to repair within a given time. Three days after the expiration of the notice a quarter's rent became due, and the repairs not having been made as required for about twenty days afterwards, the landlord brought the action to recover possession of the demised premises, and also for the quarter's rent. The defendant contended that the plaintiff by bringing an action for the rent which accrued due after the alleged cause of forfeiture for non-repair according to notice, had waived the right to insist on the forfeiture, and at the trial Ridley, J., gave judgment for the defendant, but the Court of Appeal (Smith, Rigby and Collins, L.JJ.,) reversed his decision on the ground that the claim for rent was only an election to treat the defendant as tenant up to the date on which the rent became due, and that the plaintiff was entitled to rely on the subsequent continued neglect to repair, without giving any new notice, as the breach of the covenant to repair was a continuing breach.

WILL—CONSTRUCTION—APPORTIONMENT—BEQUEST OF SHARES WITH DIVIDEND—APPORTIONMENT ACT, 1870 (33 & 34 VICT., C. 55) SS. 5, 7 (R.S O. C. 170, SS. 4, 8).

In re Lysaght, Lysaght v. *Lysaght* (1898) 1 Ch. 115, it was held by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) reversing the judgment of Kekewich, J., that where a testator bequeaths shares in a limited company coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, such declaration was a stipulation within the meaning of the Apportionment Act, 1870, s. 7 (see R.S.O. c. 170, s. 8) which prevents the Act applying, and consequently the whole

the dividend accruing at the time of the testator's death es to the person entitled under the will to the income on the ıares so bequeathed.

OMPANY—WINDING-UP—RESTRICTIONS IN ARTICLES AS TO WINDING-UP—, CONTRIBUTORY.

In re Peveril Gold Mines (1898) 1 Ch. 122, this was an pplication by the shareholders of a limited company to stay roceedings under a winding-up order. The applicants con- ended that the petitioners who had obtained the order had o right to make the application therefor on the ground that y the articles of association it was provided that no such pplication should be made without, (*a*) the consent in writing f not less than two of the then board of directors, or (*b*) in ursuance or by permission of a resolution passed at a general eeting of the company, or (*c*) unless the applicant or appli- ts should hold not less than one-fifth of the capital issued on which all calls should have been paid. Byrne, J., held stipulation in the articles invalid, and his decision was rmed by the Court of Appeal (Lindley, M.R., and Chitty Williams, L.JJ.)

CEIVER—POWER TO APPOINT—COMPANY—DEBENTURE HOLDER—EXERCISE OF POWER.

In re Maskelyne, Stuart v. *Maskelyne* (1898) 1 Ch. 133, is a e which shows that where debentures are issued by a ited company containing a condition that, at any time er the principal moneys thereby secured should have become yable, a specified company (being one of the debenture lders) might appoint a receiver of all or any part of the operty thereby charged, such power is fiduciary and must be ercised in the interest of the debenture holders as a class; nd where it was shown that an appointment of receiver under ne power had been made in the interest of shareholders, and ot in that of the debenture holders, North, J., held that the Court had jurisdiction to appoint a receiver in the interest of the debenture holders in place of the one so appointed by the company, and his judgment was sustained by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.)

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—ADMISSION OF MARRIED WOMAN—ESTOPPEL.

In *Bateman* v. *Faber* (1898) 1 Ch. 144 the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) have affirmed the decision of Kekewich, J. (1897) 2 Ch. 223, noted ante vol. 33, p. 759), to the effect that the admission under seal of a married woman cannot operate by way of estoppel against her, so as to defeat a restraint against anticipation, even in favour of third parties who have advanced money on the faith of such admission. "The result" (Lindley, M.R., says) "is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole," and although there was no fraud in the present case, nevertheless all the Judges of the Court of Appeal agree that even a married woman's deliberate fraud will not enable her to get rid of the restraint on anticipation.

WILL—CONSTRUCTION—LEGACY—ERRONEOUS STATEMENT OF INDEBTEDNESS—FALSA DEMONSTRATIO—INTENTION.

In re Rowe, Pike v. *Hamlyn* (1898) 1 Ch. 153, the construction of a will was in question. The testatrix, who was universal devisee and legatee under her deceased husband's will, bequeathed to her grandniece, "the sum of £300 in addition to the sums owing to her from my late husband's estate." As a matter of fact nothing was legally owing from the husband's estate, but the husband had given the niece, as the testatrix knew, an I.O.U. and a promissory note for two sums of £500, which, however, were not enforceable for want of consideration. The question was whether the legacy was good for £300 or £1,300. Romer, J., was of opinion that there was simply a gift of £300, coupled with an erroneous statement of indebtedness, which, had the testatrix known it to be erroneous, might have induced her to give more; but the Court of Appeal, (Lindley, M.R., and Chitty and Williams, L.JJ.,) were unable to agree with this, and, having regard to the position in which the testatrix stood to her husband's estate, considered that the bequest must be read as of £300, plus the two sums of £500, which she intended should be paid out of her husband's estate, which had devolved on her.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] TURNER *v.* BENNETT. [Nov. 10, 1897.

Will, construction of—"Own right heirs"—Limited testamentary power of devisee—Conditional limitations—Appeal—Acquiescence by appellants in judgment appealed from—Costs.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy unless a contrary intention appears, and where a devise was to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator.

Appeal dismissed with costs.

McCarthy, Q.C., *McCullough* and *Lobb*, for appellants. *Wm. Mortimer Clark*, Q.C., and *Macklem*, for respondents Bennett and others. *Hodgins*, for executors.

Ontario.] [Nov. 10, 1897.

TOWNSHIP OF SOMBRA *v.* TOWNSHIP OF CHATHAM.

Municipal corporation — Assessment — Extra cost of works—Drainage — R.S.O. (1877) c. 174—46 Vict., c. 18 (Ont.)—By-law—Repairs—Misapplication of funds—Negligence—Damages — Re-assessment—Intermunicipal works.

Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was applied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the fund so paid any further sum to replace the amount so misapplied or wasted.

Appeal allowed with costs.

Aylesworth, Q.C., for appellants. *Wilson*, Q.C. for respondents.

COURT OF APPEAL.

Osler, J.A,] HOLMES *v.* BREADY. [Feb. 19.

Appeal—Taxation of costs in Court of Appeal—Form for appeal from taxation.

An appeal does not lie to the Court of Appeal or a Judge thereof, but to the High Court or a Judge thereof, to review the taxing officer's taxation of the costs of an appeal to the Court of Appeal from a judgment of the High Court.

There has been no such change in the Act or Rules as to make *Petrie* v. *Guelph Lumber Co.*, 10 P.R. 600, inapplicable, and it is therefore to be followed.

C. A. Moss, for the plaintiff. *G. G. Mills*, for the defendant.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J., Rose, J., MacMahon, J. } [Feb. 26.
TATE *v.* NATURAL GAS AND OIL CO. OF ONTARIO.

Parties—Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

The plaintiff, having a claim for arrears of salary and damages for wrongful dismissal, sued the defendant company therefor, alleging an agreement made with the president and certain directors before the company's incorporation, and a subsequent by-law and resolution of the company ratifying the agreement. In consequence of what was alleged in the statement of defence, and after discovery had, the plaintiff applied for leave to amend by adding another company and the president of the defendant company as defendants, fearing that he might not recover against the defendant company, because, although they got the benefit of his services, it might appear that his contract was not with them, but with the other company, or that, from want of authority of those who assumed to act on behalf of one or other of the companies, his contract was in law with the president personally, or the president was liable to him in damages as upon a warranty of authority.

Held, that the plaintiff was entitled by virtue of Rule 192, to have the question as to which one of the three parties was responsible to him, decided in one action ; and, although he had omitted to join two of them originally, an order should be made, under Rule 206 (2), adding these two as defendants at this stage of the proceedings, ROSE, J., dissenting. *Bennetts* v. *McIlwraith*, (1896) 2 Q.B. 464, followed.

Aylesworth, *Q.C.*, for plaintiff. *W. R. Riddell* and *A. D. Crooks*, for defendants and proposed parties.

loss, J.A.] PATTERSON *v.* CENTRAL CANADA L. & S. CO. [Feb. 26.

ermissive waste — Tenant for life—Growth of weeds—Leave to appeal—R.S.O. 1897, c. 51, s. 77, sub-sec. 4.

An application by the plaintiffs for special leave to appeal to this Court rom the order of a Divisional Court, affirming the judgment of Street, J., which was mainly in favour of the defendants, in an action by remaindermen gainst tenants-for-life for waste.

The plaintiffs made complaint with respect to several matters in which hey alleged there had been error, but the most important claims rested pon the contention that a tenant-for-life is liable to the remainderman for ermissive waste.

Held, that the question of fact as to the existence of thistles, mustard and quack grass at the time of the defendants taking possession must be deemed concluded by the finding of the trial judge, affirmed by the Divisional Court. And unless, as to them, the law was that the tenant for life was liable for permissive waste, the defendants were not liable for the deterioration they had occasioned. In view of the array of modern authority in favour of the rule that tenant-for-life is not liable for permissive waste, in the absence of some provision in the instrument creating his estate expressly imposing the duty to keep in repair, no case has been made out for further litigating these questions in this action. See *Zimmerman* v. *O'Reilly*, 14 Gr. 646, where the question was decided against the remainderman. Eliminating this, the other matters were not sufficient to bring the case within s. 4 of s. 77 of the Judicature Act, R.S.O. 1897, c. 51.

N. F. Davidson, for plaintiffs. *D. W. Dumble*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [March 3

MCBRIDE *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Distress—Mortgagor and mortgagee—Decease of mortgagor—Seizure of goods of another on mortgaged premises—Authority of bailiff—Principal and agent—Mortgagee's agent controlling bailiff—Evidence—Admissibility—Letter of solicitor before action.

An appeal by the defendants from the judgment of the Judge of County Court of Lambton in favor of the plaintiff for $125 damages upon the findings of the jury in an action for trespass and illegal seizure and sale of the plaintiff's goods upon premises mortgaged to the defendants by Mary Ann McBride, the seizure and sale purporting to be under a warrant issued by the defendants to their bailiff to destrain the goods of Mary Ann McBride for arrears due under their mortgage, she having been for some years dead at the time of the seizure, of which the defendants were ignorant. When the defendants found that the goods were those of the plaintiff, a brother of the deceased, they ordered their bailiff to withdraw. The jury, however, found that one Stone was the agent of the defendants, and instructed the seizure and sale after he had been told that the goods were the plaintiff's.

P. D. Crerar, for the defendants, contended that there was no evidence of Stone's agency, and they were not liable for what their bailiff did in seizing the plaintiff's goods under a warrant to seize the goods of the deceased.

Aylesworth, Q.C., for plaintiff.

Held, that the intention was to seize the goods upon these premises, and the bailiff was acting within the scope of his authority as agent for a principal in making the seizure upon the premises, and the defendants were liable for his act, although the mortgagor was dead and the title in the goods and chattels had passed to another.

Lewis v. *Read*, 13 M. & W. 834, and *Hascler* v. *Lemoyne*, 5 C.B.N.S. 530, referred to.

But, if this view was not tenable, the defendants interfered with the making of the distress, through Stone, who, according to the plaintiff's evidence, was present when the distress was made, accompanied the bailiff when the latter was making the inventory, was told that the deceased mortgagor did not own the chattels, answered that he did not care, that they were on the place, wrote out the inventory and advertisement, and acted so as to convey the impression to the plaintiff that he was in control and management; and upon this evidence there was a question to submit to the jury as to the authority of Stone to act in directing and controlling the distress. See *Tate* v. *Latham*, (1897) 1 Q.B. at p. 509.

A letter written by the solicitor of the defendants to the solicitor for the plaintiff before action was improperly received in evidence; *Wagstaff* v. *Wilson*, 4 B. & Ad. 339, but this was immaterial, as there was no application for a new trial.

The appeal was dismissed with costs.

Meredith, C.J., Rose, J., MacMahon, J.] [March 3.

WALLS *v.* SAULT STE. MARIE PAPER AND PULP CO.

Parties—Assignment of debt sued on—Reassignment—Assignment by way of security only—Amendment—Adding assignee as a party.

An appeal by the defendants from the judgment of the Judge of the District Court of Algoma in favour of the plaintiff upon the findings of the jury, in an action in that Court brought to recover the balance due to the plaintiff under a contract for getting out wood. The appeal was on the grounds that the plaintiff's claim had been assigned before action to one Plummer, and only reassigned at the time of the trial, and the plaintiff was not entitled when the action was begun, and that the amount of the verdict was too large upon the evidence.

Held, that it was not clear that the plaintiff did not retain in himself an interest in the amount coming from the defendants, and that the assignment was not made by way of security, in which csae the plaintiff could recover in his own name: *Prittie* v. *Connecticut Fire Ins. Co.*, 23 A.R. 449.

After action and before trial the plaintiff gave security to Plummer for the

tedness to him, and on the day before the trial Plummer gave the plain- reassignment. Even if the objection could be held to be well taken, this d be a proper case for amendment, adding Plummer as a party: *Dawson raham*, 41 U.C.R. 532; *McGuin* v. *Fretts*, 13 O.R. 699.

Davis v. *Riley*, (1898) 1 Q.B. 1, distinguished.

Held, also, that upon the evidence the Court could not interfere with the ict.

W. E. Middleton, for defendants. *W. M. Douglas*, for plaintiff.

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et, J.] IN RE CAMPBELL AND VILLAGE OF SOUTHAMPTON. [March, 3

nicipal corporation—Closing street—By-law—Notice of intenton to pass —Absence of notice as to day on which to be considered—Invalidity of by-law—Motion to quash—Discretion—Acquiescence—Estoppel.

Motion by William D. Campbell for a summary order quashing by-law 297 of the village corporation, being a by-law "for the purpose of expro- ting and closing up certain portions of the public streets of the ge of Southampton," upon the grounds, among others, that the municipal ncil had no power to pass the by-law without proper notice, and no notice, equired by law, was given of the intention of the council to pass it; that otice of the intention of the council to pass the by-law, alleged to have given, did not fix any time for the by-law being considered and for hear- ersons opposed to it or whose rights might be affected thereby; that the icant, who had bought property affected by the by-law, had no notice or vledge of the day fixed for the passing of the by-law and had no oppor- y of opposing it.

Idington, Q.C., for the applicant.

W. H. Blake, for the village corporation, contended that s. 546 of the icipal Act, 55 Vict., c. 42, does not require that a time should be fixed by the ished notice; that the failure to fix a time was not fatal to the by-law; and the applicant had waived or acquiesced in the defect, if any, nine months ing elapsed since the by-law was passed, and he having bought his pro- ty after notice of the proposed by-law had been given.

Held, that, as it was decided in *Re Birdsall and Township of Asphodel*, U. C.R. 149 that the notice of intention to pass the by-law should state the y on which it is to be considered by the council, the statute is to be read as it contained a direction to that effect, and the notice here not having so ted, the by-law was invalid; and, under *Re Ostrom and Township of dney*, 15 A.R. 372, and *Re Robertson and Township of North Easthope*, A.R. 214, there was no discretion to refuse to quash such a by-law; and, in t, there was no acquiescence amounting to an estoppel. Order made ashing by-law with costs.

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reet, J.] HOLMES *v.* BREADY. [March 8.

Costs—Scale of—Taxation of in Court of Appeal—High Court action.

An appeal by the plaintiff from the taxation of his costs incurred in the urt of Appeal. The plaintiff recovered judgment in this action for a sum thin the jurisdiction of the County Court, and was allowed costs on the

County Court scale only, the defendant being allowed to set off the difference between costs on the High Court and County Court scale. The defendant appealed to the Court of Appeal, upon the ground that the action should have been dismissed, and the appeal was dismissed with costs. Upon the taxation of these costs the taxing officer held that they must be taxed as in a County Court action.

By Rule 1130 the costs of all proceedings in the branches of the Supreme Court are in the discretion of the Court or Judge before whom they come for hearing or determination.

Held, that the Court of Appeal having ordered the defendant to pay the costs of the appeal generally, without any limitation as to scale or amount, and there being only one tariff of fees payable upon appeals from the High Court, that tariff must govern the allowance of costs under the order of the Court of Appeal.

Rule 1132 applies only to the costs of the action in the High Court, and not to the costs of an appeal from that Court to the Court of Appeal, which are not within the discretion of a Judge of the High Court.

C. A. Moss, for the plaintiff. *G. G. Mills*, for the defendant.

THIRD DIVISION COURT.

COUNTY OF HURON.

Doyle, J.J.] BEATTIE *v.* MCDONALD. [Dec. 14, 1897.

Division Court—Claim in excess of jurisdiction.

A judge trying a case in a Division Court on a claim for an amount within the jurisdiction, is not ousted of jurisdiction because, in arriving at his decision thereon, he has incidentally to consider and adjudicate upon a claim, the amount of which exceeds the jurisdiction. The following cases were referred to: *Re Legarie* v. *Canada Loan Co.*, 11 P. R. 512; *Re Hutson* v. *Valliers*, 19 A.R. 154; *Re Mead* v. *Creary*, 32 C P. 1.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] LINDBERG *v.* THE CITY OF HALIFAX. [Jan. 15.

Municipal corporation—Payment of claim enforced by threat to turn off water —Action to recover amount paid—Party entitled to bring—Voluntary payment—Quasi contract—Ratification—Application to add or substitute plaintiff—Conditions—Duress.

Plaintiff was owner of a brewery in the city of Halifax, which he commenced to operate in the year 1891. In that year a two-inch water service pipe was supplied by the city at the request of S., who, in the absence of L.,

ing as superintendent in the constructlon of the brewery. A dispute uently arose between the city and L. as to whether the latter was liable for the pipe so supplied and for the cost of connecting it with the ater pipe and the wall of the building. While this dispute was still ding and unsettled L. sold the property to the Halifax Breweries Co., d, in which he had a large interest as shareholder, by which company siness was afterwards carried on. On the 30th July, 1896, the amount d as due to the city not having being paid, an official in the employ of y was sent to the brewery for the purpose of turning off the water as a of enforcing payment. The manager of the company thereupon under and in order to avert serious loss which would have been caused by the g off of the water, paid the amount in dispute, and made a demand upon reimbursement, who, notwithstanding his claim that the amount was e and should not have been paid, repaid the company the amount ced and brought his action against the city to recover it.

he Judge of the County Court for the County of Halifax, before whom se was tried, found that L. was not liable for the amount in dispute or rt of it.

eld, this being so, that the demand made upon L. by the company for nity was unwarranted, and that the payment by L. having been volun- e was not entitled to recover.

eld also, that the money having been obtained from the company ans of unlawful pressure exerted by city officials upon the company, the and not L. acquired the right of action against the city.

eld also, that the trial Judge was wrong in the theory upon which he ded, that the circumstances warranted the view that the company acted nt of L. in respect to the payment of the money, and that L. by reimbur- he company ratified the payment so as to acquire a right to sue the com- o recover back the sum paid.

) Because the money was paid by the manager of the company for the tion of the company and not as agent of L.

) Because the company under compulsion and against its own will paid y as to which it knew that L. repudiated liability, and the idea that the ent was made as agent of L. was therefore excluded.

) Because the sole liability of the city being based upon a fictitious or contract to which L. was not a party, the payment made by him to mpany could not entitle him to sue upon it.

) Because the wrong done by the city being a wrong done to the any, and the only cause of action therefore being that of the company ansaction between the company and the city was not one that could be d by L.

fter argument of the appeal application was made for leave to add or itute the company as plaintiff.

Held, that this could only be done on payment of costs, and with leave to ity to raise any defence which it might be advised to meet the claim by the company.

Per GRAHAM, E.J., dissenting.

Held, That the money having been clearly and unequivocally paid for L., and both parties having acted on that basis and with full knowledge, the fact that the company was relieved from pressure did not make it a payment by the company as principal.

Held also, that the subsequent ratification of the payment by L. was as effectual as if there had been a previous request.

Held also, that the act of payment was not ratified as a satisfaction of the claim of the city, but as an advance conditionally made to remove the pressure, and with a view to recovering the money; that the case was practically the same as if L. had been present when the money was paid, and had authorized the payment for him under protest.

Held also, that the city having received the money as coming from L. there was privity which enabled the action to be maintained.

Held also, that the mere threat to employ colourable legal authority to enforce payment of an unfounded claim is such duress as will support an action to recover the money paid under it.

Appeal allowed with costs.

C. S. Harrington, Q.C., and *C. P. Fullerton*, for plaintiff. *W. F. MacCoy*, Q.C., for defendant.

Full Court.] JENKINS *v.* MURRAY. [Jan. 15.

Vendor and purchaser—Responsibility of vendor for mistake or negligence of agent—Damages.

Defendant placed a number of lots of land in the hands of N., with instructions to sell. The correspondence in relation to the transaction was conducted through defendant's son-in-law, F., with whom she lived, and who acted under her instructions.

The lots in the hands of N. consisted of five lots known as "the swamp lots," five lots on Plover street, and sixteen lots on Brussels and Acadia streets.

On the 7th June N. wrote to F. asking what he would take for the lots, naming them, and on the 19th of the same month telegraphed F. as follows: "Offered $1,000 for lots mentioned in my letter 7th instant. Wire." After some further correspondence F. telegraphed "Accept offer." Whereupon N. closed the sale and received a payment of $100 on account of the purchase money. Defendant refused to complete the sale on the ground that she had been misled by F., and thought she was only authorizing the sale of the lots known as "the swamp lots."

Held, reversing the judgment of HENRY, J., for defendant, that defendant was responsible for the mistake or negligence of her agent, and for damage caused by the breach of a contract which she had authorized him to make, the terms of the contract being clear, and plaintiff's conduct in the whole transaction unimpeachable.

W. B. A. Ritchie, Q.C, for appellant. *A. Drysdale*, Q.C., for respondent.

n, E.J., at Chambers.] [Feb. 18.

IN RE MERCHANTS' BANK OF HALIFAX.

ment Appeal Court—Case stated by—Evidence—Bank held not liable assessment on increased capital not required for local business.

ase stated by the Court of Appeal on assessment for the City of Halifax, s. 343 of the City Charter for the opinion of a Judge. The Bank had sed its capital from $900,000 to $1,500,000. The increases were author- y a resolution of the shareholders, which did not state the object in sing it, but which gave the directors power to increase from time to is they saw fit.

he resolutions of the directors making the increases, in one case stated ie object of the increase was for the purpose of extending the business bank in Montreal. In the case of the other increases the object was ited.

y s. 316 of the City Charter banks are assessed on their paid-up capital, as in 1883, when the act was first passed at the rate of ⅜ths per cent., any increase of their paid-up capital, "provided, however, that in the of any bank increasing its capital for the purpose of extending its busi- utside of the city, said bank shall not be assessed in the city on such sed capital." The city assessors had assessed the Merchants Bank of x in respect to its capital, $1,500,000. The bank appealed to the Court peal on assessment, and before that court the officers of the bank swore ie several increases in its capital were made for the purpose of extending siness outside of the city, and were not required for the business of nk in the City of Halifax, and gave figures which conclusively showed be the case.

he Court of Appeal on Assessment held that the evidence of the officers bank to show the object for which the capital was increased was inad- le, and that the only evidence receivable to show this was the resolution shareholders. At the request of the bank they, however, received the ce, and submitted the question to a Judge of the Supreme Court under of the City Charter.

RAHAM, E.J., who heard the argument, decided that the Court of Appeal ound to hear the evidence of the officers of the bank, and that under the nstances the Bank was not liable to be assessed on the amount of the ses of capital, but only on the sum of $900,000, the amount of its capital 3.

E. Harris, Q.C., for bank. *W. F. MacCoy*, Q.C , for City of Halifax.

Province of New Brunswick.

SUPREME COURT.

Barker, J., In Equity.

FLEMING *v.* HARDING. [Dec. 21, 1897.

Practice—Leave to file bill—Order absolute.

Where bill was not filed within the time provided by 53 Vict., c. 4, s. 22, owing to a settlement of the suit pending, and defendants had not appeared, an order absolute was granted, giving leave to file the bill with direction for service of order on defendants.

A. P. Barnhill, for the application.

Full Court.] QUEEN *v.* MCGUIRE. [Feb. 22.

Power of judge to summon second grand jury—Jurors serving on a previous panel—Order to one coroner.

Defendant was arrested and committed for trial for theft during the sitting of the Carleton Circuit Court, and after the grand jury had been discharged the Court ordered the sheriff to summon a new grand jury, which found a true bill. It transpired that the informant and principal witness in the case was a brother of the sheriff who summoned the jury and His Honour for this reason quashed the indictment and ordered a coroner to summon a third jury. This, jury, comprising several men who had been on the sheriff's jury which found a true bill on the indictment that was quashed, also found a true bill, and the prisoner was convicted.

Held, on a case reserved, that the Court had the power, inherent in itself, to order the summoning of a second grand jury.

Held, also, that the fact of several of the jurors of the last panel having served on a previous grand jury in the same case would not invalidate the indictment.

Held also, that the order for the coroner's jury need not go to all the coroners of the county but that it was sufficient for it to go to and for the return to be made by one coroner.

A. B. Connell, Q.C., for prisoner. *A. S. White*, Attorney-General, for Crown.

Full Court.] TROOP *v.* EVERETT. [Feb. 22.

Suggestion of death of parties—Judge's order allowing same.

This was an application to rescind an order of the Chief Justice allowing plaintiff to enter a suggestion of the death of a co-plaintiff and one of the defendants. It was contended that there was no provision in the statute authorizing a Judge to make such an order, and that consequently he had no power to do so.

Held, (per TUCK, C.J., and LANDRY and MCLEOD, JJ., VANWART, J., dis-

), that even if there were no authority in the statute for the order, no could result to any of the parties, and therefore the order should not be de.

ANWART, J., based his dissenting judgment on the ground that under the of the order, if the defendant failed in the action he would be prejudiced extent of the costs.

A. Palmer, Q.C., for plaintiff. *A. H. Hanington*, Q.C , for defendant.

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ourt.] QUEEN *v.* SCHOOL TRUSTEES OF CANTERBURY. [Feb. 22.

Mandamus—Schools Act—Defective writ—New writ issued.

he Court in Trinity Term granted a rule absolute for a mandamus to l the defendants to admit five children of one Miller (of schoolable age) privileges of the district school. The mandamus was issued, and the trus- aving made a return to it in which they objected that the writ was ive in that it went to them by their individual names and not in their ate capacity, and also that it did not set out the names and ages of the en whom they were commanded to admit, counsel for the applicant l on the second common motion day of Michaelmas Term to set aside swer. The Court was of opinion that the writ was defective in not out the names and ages of the children, and without quashing the first rdered a new writ to be issued The new writ was directed to the es in their corporate capacity and set out the residence of the father as s the residence, names and ages of the children, whose admission was anded. The trustees in Hilary Term moved, pursuant to notice, to set the second writ on the ground that the Court had no power to direct the of a second writ until at least the first was quashed, and also on the d that the second writ was bad in that it contained more than one dis- ight, viz.: the right of the parent to have his children admitted to school l as the right of each of the five children to be admitted.

eld, (HANINGTON, J., dissenting, BARKER, J., in part) that the second as a valid writ, that it was necessary to set out the residence of the t and the residence and ages of the children to establish the right of the t under s. 74 of the School Act, c. 65, Con. Stat., and that therefore was only one distinct right.

. St. J. Bliss, and *H. B. Rainsford*, for the trustees. *J. W. McCready*, *eo. W. Allen*, contra.

Court.] FRASER *v.* MACPHERSON. [Feb. 22.

ll of sale—Husband to wife—After-acquired property—Consideration.

Defendant took an assignment of a first bill of sale on a number of hhrses, ges and other livery stable property of the plaintiff's husband. This bill of urported to convey to the mortgagee, in addition to the said property ibed in the schedule, "any and all the property that may hereafter during ontinuance of these presents be brought to keep up the same, in lieu of and in addition thereto, either by exchange or purchase, which so soon tained and in the actual or constructive possession of the said mortgagor

shall be subject to all the provisions of this indenture." Subsequently the plaintiff loaned her husband $600, and took from him for security a bill of sale, covering all the property described in the schedule of the defendant's bill of sale, and some additional horses, carriages, sleighs, etc., which he had since acquired. The schedule of the second bill of sale was as follows: "Eight horses, 8 single harnesses, 3 sets double harness, 8 pungs, 2 buggies, 3 waggons, 5 buffalo robes, 1 large sled, C.P.R, 1 double buss sled, 6 wraps; also all other goods, furnishings and articles and materials, now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the said J. E. F., and all property hereafter acquired therein," and the bill of sale itself contained the same provision as to after-acquired property as the first one. After this again the plaintiff's husband executed a third bill of sale to the defendant, covering all his livery stable property, and subsequently gave him a delivery order of the same. Defendant having seized all, plaintiff brought an action of trover for the conversion of the property described in the second bill of sale, or so much thereof as was not covered by defendant's first bill of sale, and also for the conversion of a phæton, which she claimed to own by reason of her having given her husband the money with which to purchase it. On the trial before McLeod, J., without a jury, plaintiff's husband testified that he gave the third bill of sale and delivery order to the defendant in consideration of the latter's undertaking to pay off his wife's claim. The Judge found a verdict for the plaintiff, assessing the damages at $480. On a motion for a reversal of the verdict or for a new trial, defendant contended that the plaintiff's bill of sale was void as being from husband to wife (the Married Woman's property Act of 1895, it was argued, not providing for such a transfer), and for insufficiency of the description of the property, and also that the provision in the first bill of sale as to after-acquired property, coupled with F.'s subsequent delivery order, subjected all the after-acquired property to the provisions of the first bill of sale. For the plaintiff it was contended that the provision in the first bill of sale as to after-acquired property was ineffectual for not indicating the same sufficiently for identification, either as to its character or its future location.

Held, per TUCK, C.J., and HANINGTON, LANDRY and MCLEOD, J.J., (BARKER and VANWART, JJ., no part) that the verdict was right, and should not be disturbed.

J. W. McCready and *J. H. Barry*, for plaintiff. *G. F. Gregory*, Q.C., for defendant.

Tuck, C.J., In Chambers.

KENNEDY *v.* NEALIS. [Feb. 28.

Execution against body—Costs payable by decree of Equity Court—Bail to the limits.

Costs being payable by the defendant under decree of the Equity Court an order absolute was obtained from the Court for an execution against the body of the defendant, he was arrested. On an application for an order to the sheriff to take bail to the limits,

Held, that the application should be granted, and that the case was distinguishable from *Ex parte Wright*, 32 N.B., in that it was not an application for habeas corpus to set aside the decree of the Equity Court.

A. O. Earle, Q.C., for the prisoner. *W. B. Wallace*, contra.

ADMIRALTY DISTRICT.

Leod, J.] LAHEY *v.* MAPLE LEAF. [Feb. 28.

vage claimed under $100—Costs—Colonial Courts of Admiralty Act—Admiralty Acts 1891 (54 & 55) and Admiralty rules.

Plaintiffs agreed to accept $25 for salvage services rendered to the yacht laple Leaf" in the harbour of St. John, and being unable to obtain a settlent with the owner, brought an action for salvage, claiming $100. The ue of the yacht was $400. The defence charged the salvors with misconct, negligence and unskilfulness, whereby the yacht had been considerably maged, and contended that under the Wrecks and Salvage Act, c. 81, s. 44, S. Can., the claim should have been brought before the Receiver of Wrecks, nd that costs should not be allowed to the plaintiffs, and should be certified o the defence. The plaintiffs contended (1) that the Act did not apply where egligence, etc., were charged, citing *The John*, Lash. 13; *The Fenix*, Swa. 13; *The Comte Nesselrood*, 31 L.J., Ad. 77; (2) That Rule 224 of the Admiralty Rules, 1891, contemplated that the action should be brought in the Vice-Admiralty Court; (3) That Rules 132, 133 by leaving costs in the discretion of e Judge had repealed the provisions of c. 81, s. 44, R.S. Can., as to costs, ting *Garnett* v. *Bradley*; (4) That c. 81, s. 4, 3 App. Cas. 944, R.S. Can., was pealed by the Colonial Courts of Admiralty Act 53, 54 Vict., c. 27, s. 2, ss. 2, ng the *W. J. Aikens*, 4 Exch. Rep. 7. Salvage having been awarded:

Held, that plaintiffs were entitled to costs, c. 81, s. 44, did not apply where defence disputed that salvage services had been rendered by charging ligence, and only applied where the only question of dispute was as to amount of salvage that should be allowed.

W. H. Trueman, for the plaintiffs. *J. R. Dunn*, for the owner.

Province of Manitoba.

QUEEN'S BENCH.

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ull Court.] KELLY *v.* WINNIPEG. [Feb. 10.

Municipal law—Ultra vires—Wages of workmen employed by corporation.

Appeal from decision of Bain, J., noted ante. p. 177, dismissed with costs.

Tupper, Q.C., and *Phippen*, for plaintiff. *Ewart*, Q.C., and *J. Campbell*, Q.C., for defendants.

Dubuc, J.] PEARSON *v.* CANADIAN PACIFIC R.W. CO. [Feb. 25.

Workmen's Compensation for Injuries Act, 1893—Lord Campbell's Act—Death by accident—Negligence.

This was a demurrer to the plaintiff's statement of claim which was issued to recover damages for the death of her husband alleged to have been caused by negligence of the defendants or their servants. Letters of administration had been taken out by a brother of the deceased, but as he was in the employ of the company he refused to sue. The demurrer was on two grounds. 1. That the statement of claim did not sufficiently show that the deceased was a workman entitled to the benefit of The Workmen's Compensation for Injuries Act," 56 Vict., c. 39. 2. That the Manitoba statute relating to compensation for death by accident governed the right of action, instead of Lord Campbell's Act, and that the widow had no right to sue notwithstanding the refusal of the administrator to do so.

Held, that the Act respecting compensation to families of persons killed by accident, R.S.M. c. 26, must govern in this Province instead of Lord Campbell's Act, and must be read along with The Workmen's Compensation for Injuries Act of 1895, and that such an action as the present can only be brought by the executor or administrator of the deceased person.

The demurrer was allowed without costs as the other ground alleged failed.

Howell, Q.C., for plaintiff. *Aikins*, Q.C., and *Culver*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Drake, J.] DUNSMUIR *v.* KLONDIKE & COLUMBIAN GOLD FIELDS. [Mar. 1.

Replevin—Motion to set aside writ of—Sureties

This was a motion to set aside a writ of replevin. The plaintiff had a time charter on the steam tug "Czar," a vessel on the British Registry, and he was in possession of her. The defendants purchased the tug from the registered owner and she was delivered to the defendant by the owner without the knowledge or consent of the plaintiff. The plaintiff replevied and the defendants moved to set aside the writ of replevin on the ground amongst others that the bond given to the sheriff was illusory and the sureties were not worth the amount for which they had become bound.

Held, that there is no language in the Replevin Act, Con. Stat. B.C. 1888, c. 101, that makes it necessary to take sureties at all, and that a bond without sureties fulfils the language of the Act.

Motion dismissed with costs.

C. E. Pooley, Q.C., for plaintiff. *Gordon Hunter*, for defendants.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

PACIFIC INVESTMENT COMPANY *v.* SWANN.

terim injunction—Equitable execution in England and in N.W.T.—Execution before judgment—Court not empowered to extend statutory remedies —Receiver—Discretion—New modes of enforcing payments.

The assets of a ranch company were, in a suit of *Barter* v *Swann*, placed n hands of a receiver for the purpose of winding up the company and dividng proceeds of assets between Barter and defendant herein. The receiver, being about to sell the assets for the purpose as alleged of paying the defendant his share of the proceeds to enable him to defeat his creditors, including he plaintiff, an injunction was granted by Rouleau J., restraining defendant rom receiving any such proceeds until after the trial of this actlon.

Held, 1. That no injunction could be granted until after judgment tained.

2. The right of a creditor to have a receiver is distinct from his right to ach debts due to the debtor, and is a means of enabling the judgment ditor to realize on the debtor's property unattainable by ordinary execution. e attachment of debts is an ordinary mode of execution and the extension that by giving the right to a creditor before judgment does not authorize an ension in such a case to other remedies.

3. That the fact of a judge granting an injunction when no jurisdiction do so does not prevent another judge from setting aside his order.

Order made dissolving the injunction.

[REGINA, Jan. 15, SCOTT, J.

This was an application to dissolve an interim injunction granted ex parte he plaintiff until trial. The plaintiffs were a company incorporated and ng business in Utah, U.S. They sued the defendant on an English judgnt for $12,000 on calls alleged to be due on stock in their company. The fence consisted mainly in putting plaintiffs to the proof of their claim. The fendant's only assets it appears from affidavit were his interest in the orn Ranch Co., the assets of which had been vested in two receivers, of om defendant was one by a decree in an action brought by one Barter ainst defendant. By the decree the amount realized on the assets was to be vided equally between Barter and the defendant.

It was alleged on affidavit filed in the present action that the receivers ere about secretly to dispose of the assets, and pay over to the defendant is share to enable him to defeat his creditors, the plaintiff in particular. The plaintiff's advocates, though they had at various times advised the receivers, had been purposely kept in ignorance of the contemplated sale. The plaintiffs thereupon applied for and obtained ex parte an interim injunction until trial, restraining the receivers in Barter *v.* Swann from paying over any money to the defendant.

The defendant moved to dissolve the injunction on the ground that it was issued improvidently, contrary to law and equity, and not just or convenient.

James Muir, Q.C., for defendant. This is an attempt to procure equitable execution prior to judgment. The courts will not in respect of a simple contract restrain a defendant from disposing of his assets, or appoint a receiver or grant an injunction in order to hold moneys or goods to enable plaintiff to retain assets out of which to make his judgment if subsequently recovered. The provision for garnishment or attachment before judgment was a purely statutory remedy. To extend these provisions as asked by plaintiff would be practically legislation by the Court. There are no authorities for granting injunction or receiver under similar circumstances.

C. C. McCaul, Q.C., for plaintiffs, admitted that defendant's grounds were sound in English law, but our law differs from that in England. The Court will grant equitable relief by way of receiver where money cannot be reached by ordinary garnishee process. In England money cannot be garnished or property attached prior to judgment. In the N.W.T. a simple contract creditor has the right at law to garnish moneys prior to judgment in liquidated demands (J.O. 368) or to attach personal property where the debtor has attempted to sell or dispose of same intending to defraud his creditors generally or plaintiff in particular (J.O. 394). If the plaintiffs were able to show that moneys were already in the the receivers' hands payable to Swann, they would be able to garnish the receivers and attach the moneys in their hands. It is only because the assets are in the hands of the receivers and not in the defendant's hands that plaintiffs cannot avail themselves of s. 394, and attach the goods themselves. The plaintiff therefore asks the Court to extend the equitable principle underlying the doctrine of equitable execution (subsequent to judgment) in England to an analagous state of facts arising in this country before judgment.

SCOTT, J.: If the plaintiffs had recovered judgment against the defendant in this action I think it will be conceded that upon disclosing these facts he would be entitled to this injunction, but there does not appear to be any authority which goes the length of holding that he is entitled to any such remedy before obtaining judgment.

It is, however, contended on behalf of the plaintiff that the principle upon which in England such relief is granted after judgment applies with equal force here, to cases where such relief is applied for before judgment, and the ground for such contention is the fact that by the law of England, no provision is made for the attachment by a creditor before judgment of a debt due to the debtor, that here debts may be attached by the creditor before he obtains judgment, and his remedies are thus extended beyond those possessed by him in England, and that, as the courts in England have interfered to protect him in the remedies possessed by him there, the court here should interfere to protect him in the more extensive remedies possessed by him here.

In this case, by reason of the fact that no moneys payable to the defendant have yet reached the hands of the receivers there is no debt which can be attached. What the plaintiff obtains in effect by this injunction is that the

ndant's interest in the proceeds of the property in hands of the receivers ound until such times as there shall be moneys of the defendant in the ds of the receivers which can be attached, or until the plaintiff obtains gment, and is thereby placed in a position to apply for a receiver of the ndant's interest in the proceeds. I think it will be conceded that he is entitled to an injunction to obtain the first object alone.

Then is he entitled to obtain the second object? I think not In my w the right of a creditor to have a receiver appointed by way of equitable cution is something distinct and apart from his right to attach debts due to debtor. They are different modes of execution. It is true that the former nedy appears to have arisen from the fact that the debtor may be entitled to und or property which cannot be reached by ordinary execution, but they distinct remedies. This is shown by the provision in Ontario respecting achment of debts, which enacts that any claim or demand arising out of st or contract which can be made available under equitable execution may attached. It may be that if such a provision had been in force here the intiff would have been entitled to the injunction as granted if it were neces- y to protect him. (The learned Judge then referred to Annual Practice, 95, p. 924 : *Wills* v. *Luff*, 38 Ch. D. 197 ; *Re Shepherd*, 43 Ch. D. 131.)

I think a reasonable deduction from the authorities is that it is a means of abling the judgment creditor to realize upon the property of the debtor ich cannot be reached by the ordinary modes of execution. The attach- nt of debt is one of those ordinary modes of execution and the extension of t remedy does not, in my view, imply the extension of any other remedy. it implied, for instance, the like extension of the remedy of equitable exe- ion, I see no reason why it should not also imply the like extension of the inary remedy by execution against lands or goods. A number of authorities re cited on the argument to show that the Courts would not at the tance of a creditor interfere to prevent a debtor disposing of his estate even t were shown that the creditor was thereby being defrauded, and it was ceded by the plaintiff's counsel that such was the case, but, if the plaintiff ight in his contention, I see no reason why a creditor in such case would be as much entitled to the interference of the Court in his behalf as the ntiff is in the present case.

It was also contended that my brother Rouleau having exercised discretion granting the injunction I should not interfere with his exercising of it. dmit that the contention is sound, if the granting of the injunction was a tter within his discretion, but I do not think it was. Although s.-s. 8 of s. 25 he Judicature Act of 1893 provides that an injunction may be granted in cases in which it shall appear to the court to be just or convenient, yet it s held in *Harris* v. *Beauchamp Brothers* (1894) 1 Q.B. p. 801, that those rds do not refer to an arbitrary or unfettered discretion on the court, and do t authorize the court to invent new modes of enforcing payments in substi- ion for the ordinary modes. In my opinion the granting of the injunction s not within the discretion of my brother Rouleau.

It was also contended on behalf of the plaintiff that the court would not rmit its officers, viz., the receivers, to deal with the defendant's property in a

way in which the defendant himself would be prevented from dealing with it, viz., by attachment under section 394 of the C. J. Ordinance. I think a reasonable answer to that contention would be that the injunction does not in any way prevent them from dealing with the property. All that it seems to prevent is the payment over to him of his share of the proceeds, and that could not be prevented by attachment under s. 394. Even if it were conceded that the plaintiff were entitled to the injunction granted I think it could not reasonably be contended that he was entitled to an injunction restraining the receivers from selling the property. That would interfere with Mrs. Barter's rights under the decree in *Barter* v. *Swann*.

For the reasons I have stated, I am of the opinion that the injunction should be dissolved, and being of that opinion it is unnecessary for me to dispose of the other objections raised by the defendant. Defendant is entitled to the costs of this application.

As the question involved is an important one, plaintiff may desire to appeal from the order dissolving the injunction. Should he do so the parties may not be in the same position when the appeal is disposed of as they are now. If it is eventually found that the defendant is now entitled to receive and dispose of his interest under the decree he should not be deprived of that right until such time as he may lose it; on the other hand if it is found that he is not so entitled his being permitted to receive or dispose of it would be an injury to the plaintiff. It was suggested on the argument that I might by my order provide against both of these contingencies, but upon considering the matter I cannot devise any order which will leave the parties in the same relative position upon the determination of the appeal as they are now.

Richardson, Rouleau, Wetmore, McGuire, JJ.] [March 4, 5, 1897.

REGINA *v.* PAH-CAH-PAH-NE-CAPI, *alias* CHARCOAL.

Crown case reserved—Admissibility of evidence of admission by accused upon trial for murder.

Held, per WETMORE, J., that the only evidence against the accused was admission made by him to James Wilson, an Indian agent, in words, "I also killed a boy up the river;" that Mr. Wilson stated he was instructed to act as legal adviser to Indians under his jurisdiction, and as a rule told them he was legal adviser to help them, and that he was not prepared to say he did not hold out any threat or inducement to prisoner to make the statement; that Mr. Wilson was a person in authority to carry out the Indian Act, and a J.P., (53 Vict., c. 29, s. 9;) and it was difficult to conceive a case in which more strongly to insist upon the rules as to non-admissibility of confessions to a person in authority without sufficient previous warning than in the case of Indians. It lay on the crown to prove no inducement or threat, and this was not shown satisfactorily by the evidence of James Wilson or his interpreter, though the latter said "I can remember any statement he (prisoner) made was voluntary; since it was not shown the interpreter knew what in law a voluntary statement was, or what in law an "inducement" amounted to, that it was not necessary to con-

whether the communication was privileged at common law or under T. Act, 869. *Regina* v. *Fennell*, 7 Q.B.D. 147, *Regina* v. *Romp*, 17 O.R. nd *Regina* v. *Thompson*, 5 Reports, Q.B.D. 393 cited in support.

Held further, that the conviction should be quashed, and the prisoner dis-ed as to this offence.

RICHARDSON, ROULEAU and MCGUIRE, JJ. concurred.

Rimmer, for accused and Department of Indian Affairs. *Johnstone*, for ney-General of Canada.

Book Reviews.

erican Negligence Reports (Current Series). New York, 1897: Remick & Schilling. Canadian agents: Canada Law Journal Co.

This is a new publication, issued first in monthly numbers, and afterwards ermanent form to include all the current state and federal decisions, nning January, 1897, relating to the subject of "Negligence." The thly numbers are advance sheets only, not intended for binding, and for h no extra charge is made. The first permanent volume is now com-e, including notes of English cases, and annotations, and is supplied, bind-and expressage included, for $5.50. One of the current numbers gives a report of the decision of the Supreme Court of Pennsylvania in *Donahue elly*, in which the principle laid down in the famous "Squib" case, 2 W. 392, 1 Smith's Leading Cases, 9th ed., 737, was extended so as to absolve liability a person who picked up a flaming gasoline lamp for the purpose hrowing it into the street, but before he could reach the door the flames ed him, and he threw it instinctively towards the door, causing thereby xplosion which injured the plaintiff. The series will be found of inestim-value by lawyers conducting cases which come under this branch of the

INTERNATIONAL ARBITRATION.

The time has not yet arrived when men have beaten their swords into shares and their spears into pruning hooks. But at least there are many think with General Sherman that "war is hell," and who are endeavouring mpress this fact upon the thoughtless and the jingoes who rave so ly about the glory of the shambles that they cannot hear the shrieks of the ired, or the heart-broken wails of the widow and the orphan. Amongst e who are doing a good work in this connection is the editor of *The Pen or rd*, 686 Madison street, Chicago, a paper which has just been started in nterest of peace and international arbitration. We are not surprised to

see amongst the eminent men who are encouraging this paper and the cause it supports, such names as those of His Excellency the Governor-General, the Lieutenant-Governor of Ontario, and Hon. J. R. Gowan, C.M.G., Senator, who has been elected Vice-President of the International Peace Association. As the editor remarks this makes a splendid beginning for Canada. It would be difficult to select a more representative trio. Many others will doubtless follow their example, by helping on the cause both with money and influence. As these are days of "wars and rumours of wars," let us think what war means, both in blood and treasure worse than wasted.

A story is current among Maritime lawyers to the following effect. At a Bar dinner, Dr. S., during the course of his speech, was observed to button his coat more tightly around him, shiver a little and look round at the windows, doors and ceiling, as if searching for something. On being asked what the trouble was, he replied, "I thought Mr. ——— must be about somewhere. I seemed to notice so many *drafts*." Possibly other of our readers than those in the Maritime Provinces recognize the party referred to.

EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

1. Rules 36, 38 and 83 of the Exchequer Court of Canada are repealed, and the following substituted therefor :

36. Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated.

38. No pleading shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

83. If the Attorney-General, petitioner or plaintiff, does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

Ottawa, Jan. 24, 1898.

Canada Law Journal.

L. XXXIV. MARCH 31, 1898. NO. 7.

We see it stated in one of our American exchanges that large number of the States biennial sessions have been pted with advantage and entire satisfaction to the public, a bill has recently been approved by the Assembly of the te of New York to the same effect, and will probably come law. The leading papers in that country approve of change. We are told that the chief opposition comes m hotel managers, boarding-house keepers, professional byists, etc. One paper remarks, "It is a long standing l grievous complaint that there is altogether too much law-king, unmaking and tinkering, and the evil has been adily growing instead of diminishing. So frequent the nges in existing statutes, and so numerous the new ones cted that it is difficult for judges and lawyers, to say hing of the general public, to keep the run of the law. adjournment of the Legislature is always hailed with a se of relief by the people, and especially by the business mmunity." This is largely true in Canada. It may not at sent be within the sphere of practical politics to make y change here, but the profession at least would be glad to it, and much money would be saved to the country.

A daily journal in commenting on the decline of litigation this province falls into some of the usual errors of laymen hen discussing legal matters. The profession do not, as is eged, object to or fight against simplicity in procedure. the contrary, all reforms in this direction have come from d have been helped forward by lawyers and by the press at represents them. Further we would say that the crease in legal business does not arise from any want of nfidence in our judicial system, but from the dulness of the

times and the general stagnation of business, especially in reference to real estate and building operations. The lay mind is not able to grasp the fact that lawyers flourish most in good times; litigation is not the most profitable branch, and only forms a comparatively small part of a lawyer's business. Again, it is not true that commercial courts are in great favour with business men. The contrary is the fact. These courts are theoretically very good, but where they exist they are but little used, and are in practice considered unsatisfactory by those who expected great benefit from them. The writer of the article referred to is, however, quite right in saying that business has decreased, and the numbers of the profession increased, and the sooner this is recognized and young men turn their attention to some other pursuits, the better for all.

THE EXCEPTIONS TO THE STATUTE OF FRAUDS.

> " . . . the lawless science of our law
> That codeless myriad of precedent
> That wilderness of single instances
> Thro' which a few by wit or fortune led
> May beat a pathway out to wealth and fame."

In reading over the many cases dealing with the Statute of Frauds the writer has been struck by the number of special instances which have from time to time been excepted from the operation of the sections of this great enactment requiring written evidence of certain transactions.

The sections particularly referred to are the first and second (as modified by R.S.O. 1897, c. 119, s. 7), by which some writing is necessary to the validity of certain leases; the fourth, which requires written evidence of all promises by executors to be personally responsible, all promises to answer for another's debt, etc., all agreements in consideration of marriage, all contracts for the sale of land, and all agreements not to be performed within a year; the seventh, by which parol declarations of trust of land are void; and the seventeenth, which requires written evidence of certain contracts for the sale of goods.

The exceptions, which have been created by many judges
fferent times, depend upon no apparent principle, but
e laid down as the circumstances of the particular case
ned to require, and they have never, so far as the writer
ware, been gathered together. It may therefore serve
ie useful purpose to show the many cases in which the
ve important provisions have been held inapplicable to
umstances seemingly clearly within either their letter or
r spirit.

We will treat these various sections separately. But
nust first be observed generally that if the written
ence required by the statute has by any means been lost,
l secondary evidence may be given of its former exist-
e and contents: *Nicol* v. *Bestwick*, 28 L.J. Ex. 4.

In considering sections one and two (as amended by
.O 1897, c. 119, s. 7) we find first that they do not extend
censes, though giving an exclusive right to the premises
a long term of years, and though an annual payment be
rved: *Wood* v. *Lake*, Sayers 3, and Sugden V. & P. P. 123.
does section one include a lease for less than three years,
n a right in the tenant to continue it by notice for three
rs more: *Hand* v. *Hall*, L.R. 2 Ex. D. 355. An agreement
a tenant to pay each year in addition to his rent a certain
t of the cost of buildings to be put up by the landlord is
a new demise of the buildings, but merely a collateral
mise: *Hoby* v. *Roebuck*, 17 R.R. 477. And though a lease
vriting not under seal will be void by R.S.O. 1897, c. 119,
yet it will be construed as an enforcable agreement to
nt and accept a lease: *Bond* v. *Rosling*, 1 B. & S. 371,
ker v. *Taswell*, 1 DeG. & J. 559.

Moreover, if the lessee enters he is governed by all the
ns of the lease, just as if it had been formally executed;
lsh v. *Lonsdale*, 21 C.D. 14. Lastly R.S.O. 1897, c. 119, s. 7,
s not apply to equitable interests, but such interests will
s by an unsealed writing: *Stamers* v. *Preston*, 9 Ir.
.R. 355.

Coming to section four we will deal first with the cases
ch have been excepted out of the statute on general

grounds, without special reference to any one of the classes of transactions particularly dealt with in the section. An agreement unenforcable by the statute may be proved by way of defence to an action: *Lavery* v. *Turley*. 30 L.J. Ex. 49, or to excuse a trespass: *Carrington* v. *Roots*, 2 M. & W. 248; *Wood* v. *Manley*, 11 A. & E. 34, or to show that a cause of action has been barred by accord and satisfaction; *Massey* v. *Johnson*, 1 Ex. 241; and if a defendant in his pleading admits the agreement, the statute no longer applies even as against his heir: *Attorney-General* v. *Day*, 1 Ves. Sr. 220. Secondly, the statute has no application to agreements which by fraud have not been reduced to writing: *Whitechurch* v. *Bevis*, 2 Bro. C.C. 565.

We will next deal separately with the different classes of transactions which fall within the fourth section, and firstly of promises to answer for the debt, default or miscarriage of another. Any verbal guarantee is so far good that money paid under it cannot be recovered: *Shaw* v. *Woodcock*, 7 B. & C. 73. In the exercise of their summary jurisdiction over their own officers the Superior Courts will enforce against a solicitor a parol guarantee given in a cause: *Re Greaves*, 1 Cr. & J. 374 n. Contracts of indemnity are not within the statute: *Re Hoyle*, 93 I. Ch. 84. *Guild* v. *Conrad* (1894), 2 Q.B. 885, which is a decision of considerable importance as the line of distinction between a guarantee and an indemnity was said by Lord Esher, M.R., to be a very nice question: *Sutton* v. *Grey* (1894), 1 Q.B. 287. The statute has no application to an agreement of novation as where two or more agree to be answerable for what was formerly the debt of one alone: *Ex p. Lane*, 1 DeG. 300.

It was formerly held that the statute did not apply to a guarantee given before the creation of the principal's liability: *Mowbray* v. *Cunningham*, cited in *Matson* v. *Wharam*, 2 T.R. 808. But this is not now the law. A debtor's promise to pay the debt to the assignee of the creditor is not within the statute, though a debt of the creditor to such assignee be thereby discharged, because it is a promise to pay the debtor's own debt: *Hodgson* v. *Anderson*, 3 B. & C. 842. Promises that

ertain thing shall be done by a third person as that he ll sign a guarantee are not within the statute: *Bushell* v. *nan*, 1 Bing. N.C. 103. Promises to answer for another's ot are not within the statute when that other is not also ble: *Birkmyr* v. *Darnell*, 1 Sm. L.C. 310: *Mountstephen* v. *keman*, L.R. 7 Q.B. 196. The result is the same though e consideration was received by that other, as in the case promises to answer for an infant's contracts (not being for ecessaries): *Harris* v. *Huntbach*, 1 Burr. 373. The same is ue where the the liability of that other, though previously xisting, is discharged by the guarantee: *Goodman* v. *Chase*, B. & Ald. 297.

Promises are not within the statute if there is any interest r liability in the guarantor or his property, except such as rises out of his promise: *Fitzgerald* v. *Dessler*, 7 C.B. N.S. 74, for instance where a lien or security is given up in con- deration of the promise: *Walker* v. *Taylor*, 6 C. & P. 752, or here a right to distrain goods in which the promissor is terested is given up: *Williams* v. *Leper*, 3 Wils. 308. The atute does not apply where the immediate object of the uarantee is not the discharge of a third person's liability, ough such discharge follows indirectly: *Castling* v. *Aubert*, East. 325; for instance, the promise of a del credere agent, ie immediate object being only to secure care on his part, not within the statute, though he is personally liable if the urchasers make default: *Wickham* v. *Wickham*, 2 Kay & J. 78, nor are promises to pay another's debt in consideration a transfer of the debt within the statute: *Anstey* v. *Marden*, B. & P.N.R. 124.

Secondly, of agreements in consideration of marriage. art performance of such agreements is sufficient to except iem from the operation of the statute: *Taylor* v. *Beech*, Ves. Sr. 296, and of course promises to marry are not in ıy sense within it: *Harrison* v. *Cage*, 1 L'd. Ray'd 386.

Thirdly, of contracts for the sale of land. Contracts col- teral to a transfer of an interest in land are not within the atute: *Morgan* v. *Griffith*, L.R. 6 Ex. 70, or preliminary to ıch a transfer, as for instance a contract for the searching of title: *Jeakes* v. *White*, 6 Ex. 873.

Shares in companies though owning and using land are not "land" within the statute: *Watson* v. *Spatley*, 10 Ex. 222; *Bradley* v. *Holdsworth*, 3 M. & W. 422; nor fixtures: *Hallen* v. *Runder*, 1 C. M. & R. 266; nor such products of land as come within the definition of fructus industriales: *Evans* v. *Roberts*, 8 D. & R. 611; nor fructus naturales unless still standing, and unless it is intended that they should obtain some benefit from so remaining: *Marshall* v. *Green*, L.R. 1 C.P.D. 35. An agreement for improvements by a landlord to be paid for by an increase of rent is not within the statute: *Hoby* v. *Roebuck*, 17 R.R. 477; *Donellan* v. *Read*, 3 B. & Ald. 899; nor an agreement to build upon land: *Wright* v. *Stavert*, 2 E. & E. 728. An equitable mortgage by deposit of title deeds is not within the Act: *Russel* v. *Russel*, 2 Bro. C.C. 269; and a lease within section 2 of the Act is not an agreement concerning land within section 4 and does not require writing, if the tenant enters, and the tenancy will be governed by all the parol terms: *Edge* v. *Stafford*, 1 C. & J. 391; *Bolton* v. *Tomlin*, 5 A. & E. 856. Sales before an officer of the court confirmed by order are not affected by the statute: *Attorney-General* v. *Day*, 1 Ves. Sr. 220. Any agreement concerning land will be taken out of the operation of the statute by part performance: *Butcher* v. *Stapely*, 1 Ver. 363.

Lastly, of agreements not to be performed within a year. An agreement is not within the statute unless it appears by its whole tenour that it is to be performed after the year: *Peter* v. *Campton*, 1 Sm. L.C. 9th ed. 308; nor if it is intended to be performed by one party within a year, for instance, a sale of goods not to be paid for within a year: *Donellan* v. *Read*, 3 B. & Ad. 906. A parol lease good under section two is not invalid under this section, because not to be performed within one year: *Bolton* v. *Tomlin*, 5 A. & E. 856. A hiring for one year and so from year to year as long as the parties please is not within the Act: *Beeston* v. *Collyer*, 12 Moo. 552. A contract to share the profits of an undertaking not to be completed within one year is not within the Act: *McKay* v. *Rutherford*, 6 Moo. P. C. 414.

We next turn to section seven, dealing with parol declara-

ns of trusts of land, and find as follows: Trusts for Crown are not within the statute: *Addington* v. *Cann*, tk. 153. The statute cannot be used as a cloak for fraud, instance, secret trusts for the grantor of property will be orced against the grantee: *Haigh* v. *Kaye*, L.R. 7 Ch. App. ; *Booth* v *Turle*, L.R. 16 Eq. 182; an apparently absolute veyance may be shown by parol to be a mortgage: coln v. *Wright*, 4 DeG. & J. 16; and where an agent has en a contract or conveyance in his own name the agency y be shown by parol to vest the beneficial interest in the ncipal: *Archibald* v. *Goldstein*, 1 Man. L.R. 8; *Rochefoucault Boustead*, (1897) 1 Ch. 196; and secret trusts in wills have ways been held to be without the statute: *Re Boyes*, 26 C.D. 1, *Russell* v. *Jackson*, 10 Ha. 204. Where a conveyance is ade for an illegal purpose not fulfilled the grantee will be clared a trustee for the grantor: *Davies* v. *Otty*, 35 Beav. 208.

Coming last of all to the seventeenth section we find a ry limited number of exceptions, due doubtless to the fact at the requirements of the statute as to evidence may be tisfied in several different ways. Investigation shows, how-er, that stocks and shares are not goods and merchandise thin the statute: *Duncuft* v. *Albrecht*, 12 Sim. 189; *Watson Spatley*, 10 Ex. 222, nor are fixtures: *Lee* v. *Risdon*, 7 Taunt. 8; and an agreement to build a house is not within the tion: *Cotterell* v. *Apsey*, 6 Taunt. 322.

In considering this formidable array of cases by which e field of this famous statute has been eaten into and cur-led, one is inclined to agree in the doubt expressed by . Justice Kekewich, as to the benefit resulting from its ssing, when he says in *James* v *Smith*, 63 L.T.N.S. 525, "It not part of my duty to say whether on the whole e Statute of Frauds has been a beneficial or a mis-ievous statute. As to that there have been many opinions. rhaps the only satisfactory answer to this doubt will be nd in another quotation from the opinion of the judges on which the judgment of the House of Lords in e case of *Warburton* v. *Loveland*, 6 Bligh, N.R. 29, was unded, as follows: "But the general rules of construction

which have been established from the earliest times require a large and liberal interpretation of any provision made for the suppression of fraud. In *Heydon's Case*, 3 Rep. 7, the Barons of the Exchequer resolved that the construction of the statute then under consideration before them must be made "by enquiring what was the mischief and defect against which the common law did not provide: what remedy the Parliament had appointed to cure the disease of the commonwealth, and what was the true reason of the remedy." And the observation which follows in the report is one which ought never to be lost sight of in any case, and is peculiarly applicable to the present, namely, "that the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and pro privato commodo; and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

W. MARTIN GRIFFIN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

EXECUTOR—DELAY IN TAKING OUT PROBATE—NEGLECT AND DEFAULT.

In re Stevens, Cooke v. *Stevens* (1898) 1 Ch. 162 the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.) have affirmed the judgment of North, J. (1897) 1 Ch. 422 (noted ante vol. 33, p. 486), holding that where there is delay in collecting assets, owing to the delay of executors in applying for probate, whereby interest is lost to the estate, the executors are not liable to account for such loss on the footing of wilful neglect and default. The remedy of parties likely to suffer by delay in taking probate, is to cite the executor in the Surrogate Court.

ADE NAME—INJUNCTION.

Pinet v. *Maison Louis Pinet* (1898) 1 Ch. 179, was an action ught by the plaintiffs to restrain the defendant companies n using the name of "Pinet" in connection with the sale or nufacture of boots and shoes not of the plaintiffs' manu- ure. The facts were, that a person of the name of Dunch 892 took the name of "Pinet," and carried on business reunder as a maker of boots and shoes, and subsequently l this business to the defendant company, "Maison Pinet." e plaintiffs were well-known French boot and shoe makers, the object of Dunch and the Maison Pinet Company in ng the name "Pinet" was to obtain for their goods the efit of the plaintiffs' reputation. Subsequently Maison et went into liquidation, and a new company was organized led "Maison Louis Pinet," also defendants. In this latter npany a person alleged to be named Louis Pinet was a rector, but as the judge found this was an assumed name. orth, J., granted the injunction as prayed against both mpanies.

OMPANY—AGREEMENT TO ISSUE DEBENTURE—EQUITABLE SECURITY.

Pegge v. *Neath & District Tramways Co.* (1898) 1 Ch. 183, nay be taken as illustrating that maxim of equity, whereby a hing is considered to be done, which ought to be done. The laintiff had lent money to the defendant company in 1882 pon the security of a promissory note, bearing 5 per cent. nterest, and the company then undertook that, whenever equired so to do, they would issue debentures bearing interest t 4½ per cent., of a series which constituted a second charge n the company's assets. In 1894 an action was brought by olders of the first series of debentures to enforce their ecurity, and the plaintiff in the present action was one of he plaintiffs in that action, and did not then claim to be a older of a debenture of the second series. He continued to eceive interest at five per cent. on his note, and had not pplied for debentures in respect of the amount secured hereby. After judgment in the action by the holders of the irst series of debentures, he for the first time claimed to have

WILL—CONSTRUCTION—PERIOD OF ASCERTAINING CLASS—GIFT TO CLASS—REMOTENESS—PERPETUITY.

In re Powell, Crossland v. *Holliday* (1898) 1 Ch. 227, the construction of a will was in question; the testator directed his trustees to pay the income of his personal estate to the children of his sister in equal shares during their lives, and after their deaths to divide the share equally between their children. The testator's sister survived him, and the question was whether the gift in favour of her children's children was void for remoteness; and Kekewich, J., held that the gift to the children of the testator's sister was confined to children born at the date of the testator's death, and that the gift over to their children was consequently valid.

TENANT FOR LIFE—LEASEHOLD — REPAIRS — COVENANTS—RENT - REMAINDERMAN.

In re Tomlinson, Tomlinson v. *Andrew* (1898) 1 Ch. 232, deals with a question recently up for consideration in *Patterson* v. *Central Canada L. & S. Co.* before the Divisional Court (Boyd, C., and Robertson, J.), viz., the liability of a tenant for life for repairs. In this case the tenant for life was entitled to leaseholds under a bequest thereof contained in a will, which did not expressly fetter the bequest with any obligation on the part of the tenant for life to assume the covenants or obligations imposed by the lease under which the premises were held by the testator. The lease contained the usual covenants to repair, and pay rent, etc., and Kekewich, J., held that as between the tenant for life and the remainderman, the former was under no obligation by accepting the bequest, to perform any of the covenants in the lease, and that that obligation rested on the testator's estate.

TRADE UNION—MALICIOUSLY INDUCING EMPLOYER TO DISCHARGE SERVANT AND NOT TO EMPLOY HIM AGAIN—MALICE—DAMNUM ABSQUE INJURIA.

Allen v. *Flood* (1898) A.C. 1, may confidently be regarded as a very important decision, and judging from the evident care and deliberation it has received, it was obviously regarded as such by the House of Lords. The case was known in the Court below as *Flood* v. *Jackson*, and the decision of the Court

Appeal (1895) 2 Q.B. 21, which is now reversed, was noted
e, vol. 31, p. 472. The point involved was whether the
fendant, a delegate of a trades union, who had maliciously
the jury found) procured the dismissal of the plaintiff
m his employment under a threat that if he was not dis-
ssed and refused further employment all his employers' other
en would quit work, was liable to the plaintiff in damages
r the injury thus sustained, no breach of contract between
e plaintiff and his employers being involved in his dismissal.
he Court of Appeal decided that the defendant was liable,
ut the House of Lords have now solemnly declared that
ich an action on the part of the defendant, even though
aliciously done, involves no legal liability to the party
jured. Before arriving at this conclusion they called for the
ssistance of several of the Judges of the High Court, the
ajority of whom were in favour of the view taken by the
ourt of Appeal; but, notwithstanding the majority of
e Law Lords, decided the case the other way. In favour
the plaintiff were Kennedy, J., and the Court of Appeal
ord Esher, M.R., and Lopes and Rigby, L.JJ.) and Haw-
ns, Cave, North, Wills, Grantham and Lawrence, JJ., and
ords Halsbury, L.C., Ashbourne and Morris; and, in favour
the defendant, Mathew and Wright, JJ., and Lords
atson, Herschell, Macnaghten, Shand, Davey and James.
otwithstanding, therefore, that there was a majority of five
dges in the plaintiff's favour, his action failed. The case may
erefore be taken to establish the broad proposition that
aliciously to induce a person to do a legal act whereby a
ird party may suffer damage involves no legal liability, and
at it is, in short, a case of damnum absque injuria. As
ord Watson succinctly puts it, "the existence of a bad
notive, in the case of an act which is not in itself illegal,
will not convert that act into a civil wrong for which repara-
tion is due."

WILL—CONSTRUCTION—LEGACIES CHARGED ON LAND—SUBSEQUENT SPECIFIC DEVISE.

Bank of Ireland v. *McCarthy* (1898) A. C. 181, was an appeal from the Irish Court of Appeal. The question at issue turns upon the construction of a will, whereby the testator made his legacies a general charge on his realty, in case his personal should prove insufficient, and then specifically devised all his lands. There was no residuary devise. The personal estate was deficient, and the devisees claimed that the lands specifically devised were free from the charge in favour of the legatees, on the ground that there is a presumption of law, that lands specifically devised are not intended to be subject to a general charge of legacies, unless it plainly appears that that was the testator's intention. The House of Lords (Lords Herschell, Macnaghten, Morris and Shand), affirmed the decision of the Court of Appeal, holding that in this case the intention of the testator was sufficiently manifest that the lands specifically devised should be subject to the charge, and therefore the presumption of law was rebutted.

PATENT—INFRINGEMENT—FOREIGN INFRINGEMENT SOLD ABROAD, AND DELIVERED IN ENGLAND—POST OFFICE.

The Badische Anilin &c. v. *The Basle Chemical Works* (1898) A.C. 200, is a case which in the Court of Appeal was known as *Badische Anilin* v. *Johnson* (1897) 2 Ch. 322, noted ante p. 18, and was an action by a plaintiff resident abroad to restrain the infringement of an English patent by a foreign manufacturer under the circumstances mentioned in our previous note, p. 18. The House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten and Davey), have affirmed the judgment of the Court of Appeal, holding that as the contract of sale by the defendant was completed by the delivery to the post office in Switzerland, and as the post office there became the agent of the buyer and not of the seller, the latter had not made, used, exercised or vended the invention within the ambit of the patent.

EGLIGENCE—DEFECTIVE RAILWAY WAGGON—MASTER AND SERVANT—INJURY TO SERVANT ARISING FROM DEFECTIVE WAGGON BELONGING TO THIRD PARTY.

The Caledonian Ry. Co. v. *Mulholland* (1898), A.C. 216, was appeal from a Scotch court in an action of negligence. e facts were as follows: The Caledonian Ry. Co. had a tract with the gas commissioners at Glasgow to deliver ls at Dumfries station, and the Glasgow & S. W. Ry. had ntract with the gas commissioners to haul the coal from Dumfries station to the gas works: for the convenience of nsport, the coals were not unshipped at the Dumfries sta-n, but remained in the Caledonian Ry. Co.'s waggons, and se waggons were then taken possession of by the Glasgow S. W. Ry. Co., and hauled by horses under the control of ir men to the gas works. One of the waggons of the edonian Ry. Co. had a defective break, and in consequence this defect the plaintiff's husband, who was in the employ-nt of the Glasgow & S. W. Ry., was killed. The action s brought against both railway companies, and upon a ceeding in the Scotch Court, somewhat in the nature of demurrer, they were both held to be liable. The Caledo-n Ry. Co. appealed to the House of Lords (Lords Hals-ry, L.C., and Herschell, Macnaghten, Morris and Shand), d their appeal was unanimously allowed. The case seems establish the proposition, that when a deceased person mes to his death by reason of a defect in a vehicle or other paratus of another, who owed him no duty to have such hicle or apparatus in an efficient condition, there is no bility on the part of such other person to the representa-ves of the deceased. *Heaven* v. *Pender*, 11 Q.B.D. 503, was lied on by the respondents, but was considered by Lord Herschell to rest on the ground that in that case the third party had in effect invited the person injured to use the defec-tive staging.

ORIMINAL LAW—MARITAL COERCION—(CR CODE, SS. 12 13).

Brown v. *Attorney-General* (1898) A.C. 234, was an appeal from the Court of Appeal of New Zealand in a criminal case. The appellant, a married woman, had been tried for unlawfully using instruments with intent to procure an abortion. The New Zealand Criminal Code includes provisions similar to those in Cr. Code ss. 12, 13, and the jury at the trial without any evidence except the fact of marriage, had found that the prisoner had acted under the coercion of her husband, notwithstanding this finding the prisoner was convicted, and her conviction was affirmed by the Court of Appeal. The Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Watson, Hobhouse and Davey and Sir R. Couch), affirmed the decision, being of opinion that the point sought to be raised by the appeals, viz., whether under the Code the fact that the offence was committed under the control or by command of the husband was a defence, was not open to the appellant on the facts, inasmuch as there was no evidence of any such control or command.

TRADE NAME—INJUNCTION—"FLAKED OATMEAL"—TERM OF ORDINARY DESSCRIPTION—IDENTIFICATION OF NAME WITH GOODS BY USER.

Parsons v. *Gillespie* (1898), A.C. 239 was an action to restrain the use of the trade name of "Flaked Oatmeal," by the defendant in connection with goods not sold or manufactured by the plaintiffs. The plaintiffs relied on *Reddaway* v. *Banham* (1896) A. C. 199 (see ante vol. 32 p. 578), but the Judicial Committee, while approving of that case, nevertheless held that the plaintiffs were not entitled to succeed, because they had failed to prove that the name had become so identified with the goods manufactured by them, that its use by the defendants was calculated to have or did have the effect of enabling them to pass off their goods as those of the plaintiff, and the judgment of the Supreme Court of New South Wales dismissing the action, with damages resulting from the granting of an interim injunction, was affirmed.

UEEN'S COUNSEL—R.S.O. 1877, c. 139,—VALIDITY OF—B.N.A. ACT, s. 92, SUB-SECS. 1, 4, 14.

In *Attorney-General of Canada* v. *Attorney-General of Ontario* 8), A.C. 247, the Judicial Committee of the Privy Council Lord Chancellor and Lords Watson, Macnaghten, Morris. ey, Sir Henry DeVilliers and Sir Henry Strong) have med the validity of R.S.O. (1877) c. 139, enabling the tenant-Governor of Ontario to appoint Queen's Counsel to confer patents of precedence on members of the ario Bar. Lord Watson, who delivered the judgment, nes the position of a duly appointed Queen's Counsel as ows: "It is in the nature of an office under the Crown, hough any duties which it entails are almost as unsubstan-l as its emoluments, and it is also in the nature of an honour dignity to this extent, that it is a mark and recognition by ne Sovereign of the professional eminence of the counsel pon whom it is conferred. But it does not necessarily ollow that, as in the case of a proper honour or dignity, the evation of a member of the Bar to the rank of the Queen's ounsel cannot be delegated by the Crown, and can only be ected by the direct personal act of the Sovereign." In as defining the principle on which the honour is conferred, ord Watson, in view of the past practice of Her Majesty's dvisers in Canada, must be presumed to be speaking from n ideal rather than an actual point of view, Having now, owever, such an authoritative statement of the principles which ought to guide the selection of Queen's Counsel, we nay, perhaps, hope that in the making of future appointments o this office in Canada there will be an honest effort to act up to them. The power of the Provincial Legislature to deal vith the matter was held to be derived from the B.N.A. Act, . 92. sub-secs. 1, 4, 14.

A correspondent has obligingly drawn our attention to a slight inaccuracy in the note of *Paget* v. *Paget* (1898), 1 Ch. 47, ante p. 153. It is there stated that we have in Ontario no counterpart of the English Act enabling the Court to relieve a wife's property from restraint against anticipation. Our correspondent points out that in R.S.O. (1897) c. 163, s. 9, the section in question is enacted.

Correspondence.

To the Editor of the Canada Law Journal.

DEAR SIR,—I observe that you have referred lately to a remarkably able work of Mr. Dicey's on the "Conflicts of Law," I do not think the work is sufficiently appreciated. It is without doubt the ablest work upon the subject of which it treats in the English language, and the day is probably not very far distant when it will be quoted in our courts on a similar footing as "Preston on Conveyancing."

While referring to this matter, will you also allow me space to refer to "Pollock & Maitland's History of English Law" and "Maitland's Domesday Book and Beyond"? I suppose the every-day lawyer would not take a great deal of interest in such works and yet no person can appreciate and understand the history of English law, its development and present status, without reading just such works as these, and certainly Pollock & Maitland's publication is one that should be read by every person whose aim is to be anything better than an office lawyer. I am not overlooking the fact that the lawyer who is busy in court day by day has but little spare time, and might, perhaps, doubt the utility of his wasting much of his valuable time upon works of this character, and yet, the curious person will, if he reads Pollock & Maitland, see that the case of *Queen* v. *Millis*, 10 Clark & Finelly 534, was improperly decided. The Court went astray because it misapprehended the legal effect of some old cases referred to by the respondent's counsel. See note 1, p. 370, vol. 2, Pollock & Maitland.

W. H. MCCLIVE.

St. Catharines.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

ec.] RIOU *v.* RIOU. [Dec. 9, 1897.

Deed—Construction of—Servitude—Roadway—User—Art. 549 C.C.

n 1831 the owners of several contiguous farms purchased a roadway adjacent lands to reach their cultivated fields beyond a steep mountain, crossed their properties, and by a clause inserted in the deed to which all were parties they respectively agreed "to furnish roads upon their ctive lands to go and come by the above purchased road for the cultiva- of their lands, and they would maintain these roads and make all neces- ences and gates at the common expense of themselves, their heirs and ns." Prior to this deed and for some time afterwards the use of a road the river front to a public highway at some distance farther back, had tolerated by the plaintiff and his auteurs, across a portion of his farm h did not lie between the road so purchased over the spur of the moun- and the nearest point on the boundary of the defendant's land, but the r claimed the right to continue to use the way. In an action (négatoire) rohibit further use of the way.

Held, that there was no title in writing sufficient to establish a servitude ss the plaintiff's land over the roadway so permitted by mere tolerance ; the effect of the agreement between the purchasers was merely to estab- servitudes across their respective lands so far as might be necessary to access to each of the owners to the road so purchased from the nearest ticable point of their respective lands across intervening properties of the rs for the purpose of the cultivation of their lands beyond the mountain. eal dismissed with costs.

Langelier, Q.C., and *Choquette*, for appellant. *Pelletier*, Q.C., and *Riou* espondent.

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bec.] DELORME *v.* CUSSON. [Dec. 9, 1897.

eal—Jurisdiction—Title to land—Petitory action— Encroachment—Con. structions under mistake of title—Good faith—Common error—Demolition of works—Right of accession—Indemnity—Res judicata—Arts. 412, 413, 429 et seq., 1047, 1241 C.C.

An action to revendicate a strip of land upon which an encroachment was nitted to have taken place by the erection of a building extending beyond boundary line, and for the demolition and removal of the walls and the ction of the defendant, involves questions relating to a title to land, inde-

pendently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor has in good faith and with the knowledge and consent of the owner of the adjoining lots erected valuable buildings upon his own property, and it afterwards appears that his walls encroached slightly upon his neighbor's land he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In such a case the judgment in an action en bornage previously rendered between the same parties, cannot be set up as res judicata against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

An owner of land need not have the division lines between his property and contiguous lots of land established by regular bornage before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary. Appeal allowed with costs. Judgment of Court of Queen's Bench (Q.R. 6 Q.B. 202) reversed, and judgment of Superior Court (Q.R. 10 S.C. 329) restored.

Geoffrion, Q.C., for appellant. *Fortin*, for respondent.

Quebec.] POWELL *v.* WATTERS. [Dec. 9, 1897.

Title to lands—Deed, form of—Signature by a cross—19 Vict. c. 15, s. 4 (Can.) Registry laws—Arts, 2134, 2137 C.C.—Litigious rights—Acquiescence by first purchaser in subsequent deed by his vendor—Evidence—Commencement of proof in writing—Finding of facts—Warrantor impeaching title—Arts. 1025, 1027, 1472, 1480, 1487, 1582, 1583 C.C.

Where the registered owner of lands was present, but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof. The conveyance by an heir-at-law of real estate which had been already granted by his father during his lifetime is an absolute nullity, and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands, and whose title is registered. Writings under private seal which have been signed by the parties, but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence. The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given. Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession, and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights. Appeal dismissed with costs. Judgment of Court of Review (Q.R. 12 S.C. 350) affirmed.

Geoffrion, Q.C., for appellant. *Lafleur* and *Aylen* for respondent.

ec.] LEFEUNTEUM *v.* BEAUDOIN. Dec. 9, 1897.

l—Reversal on questions of fact—Evidence—Affirmative testimony—nterested witnesses—Art. 1232 C.C.P—Title to land—Prescription by ten ears—Limitation of actions—Equivocal possession—Mala fides—Sheriff's eed—Nullity.

The Supreme Court of Canada may take questions of fact into considera- n appeal, and if it clearly appears that there has been error in the sion or appreciation of evidence by the courts below, their decisions e reversed or varied. *North British and Mercantile Ins. Co.* v. *Tour-* 25 S.C.R. 177, followed. In the estimation of the value of evidence inary cases the testimony of a credible witness who swears positively to should receive credit in preference to that of one who testifies to a nega- The evidence of witnesses who are near relatives or whose interests are y identified with those of one of the parties, ought not to prevail over the ony of strangers who are disinterested witnesses.

Evidence by common rumour is unsatisfactory and should not generally mitted. Appeal allowed with costs.

Belcourt and *Beaubien*, for appellant. *Lajoie* and *Lussier*, for respondent.

EXCHEQUER COURT.

AUER INCANDESCENT LIGHT *v.* DRESCHEL.

t of invention—Canadian patent—Foreign patent—Expiration of.

The expression "any foreign patent" occurring in the concluding clause of the ction of the Patent Act, viz.: "Under any circumstances if a foreign patent the Canadian patent shall expire at the earliest date on which any foreign for the same invention expires," must be limited to foreign patents in exist- when the Canadian patent was granted.

[OTTAWA, Jan. 24. BURBIDGE, J.

The facts appear in the reasons for judgment.

. A. Duclos, for plaintiff. *J. E. Martin*, for defendant.

BURBIDGE, J.—The question in this case is as to the meaning of the con- ng clause of the eighth section of the Patent Act, as re-enacted in s. 1 of Vict., c. 24. That clause, which was first enacted as part of s. 7 of the t Act, 1872, is as follows:

And under any circumstances if a foreign patent exists, the Canadian t shall expire at the earliest date on which any foreign patent for the invention expires."

f the expression "foreign patent," where it last occurs in the clause has nce to a foreign patent existing at the time when the Canadian patent is ed, the plaintiff is entitled to judgment in this case. If on the contrary ans any foreign patent, and includes a foreign patent taken out after the f the Canadian patent as well as one obtained prior to such date, the dian patent on which the plaintiff relies has expired, and the defendants

are entitled to judgment. In 1872 when the provision in question first found a place in the Canadian patent law, a similar provision existed in the patent laws both of England (15-16 Vict., c. 83, s. 25, repealed by 46-47 Vict., c. 57) and of the United States (Act of 1870, s. 25, R.S. s. 4887), but expressed in the statutes of both countries in terms that made it clear that the English patent in the one case, and the United States patent in the other, did not expire at the expiration of the foreign patent unless such foreign patent had been in existence when the English or United States patent respectively was taken out. If in the Canadian statute the expression "the foreign patent" or "such foreign patent" had been used instead of "any foreign patent," it would be clear, I think, that the Parliament of Canada had intended to adopt the rule on this subject then in force in England and in the United States.

By the English statute 15 & 16 Vict., c. 83, s. 25, it was provided that the English patent should be void immediately upon the expiration or determination of the foreign patent obtained prior to the English patent, or where there were more than one such foreign patent, then immediately upon the expiration or determination of the foreign patent that should first expire or be determined; and by the statute of the United States, the Consolidated Patent Act of 1870, s. 25 (see also R. S. s.4887) it was provided that the United States patent should expire at the same time with the foreign patent, or if there were more than one, at the same time with the one having the shortest term. In both cases the context makes it clear that the foreign patent by the expiration of which a domestic patent was to become void, must have been in existence prior to the granting of the domestic patent. And it may be that the expression "any foreign patent" used in s. 7 of the Patent Act, 1872, was meant to be subject to a like limitation; and I am inclined to think that it was. The earlier part of the section deals with the subject of foreign patents existing at the date of the Canadian patent, and it is not unreasonable to construe the words in the concluding clause as having reference to the same class of foreign patents. And then if it had been the intention of Parliament to adopt a rule on the subject different from that then in force in England and in the United States that intention would, I think, have been clearly expressed. I think the expression "any foreign patent" in the clause with which s. 7 of the Patent Act of 1872 concluded, and s. 8 of the Patent Act (R.S.C. c. 61, 55 & 56 Vict., c. 24, s. 1) concludes, should be limited to foreign patents in existence when the Canadian patent was granted.

There will be judgment for the plaintiff with costs, and the injunction granted herein will be continued.

Province of Ontario.

HIGH COURT OF JUSTICE.

ered ith, C.J., Rose, J., MacMahon, J.] [Feb. 7.

CHURCH WARDENS OF ST. MARGARET CHURCH *v.* STEPHENS.

hurch—Week-day services—Band at adjacent rink—Ordinary user of property by services—Non-natural user by band—Injunction.

In an action by the church wardens and trustees of a church, wherein eek-day services were held, to restrain the playing of a band in an adjoining ating rink, which had the effect of disturbing the services.

Held, that the use by the plaintiffs of the church in that way was an ordinry reasonable and lawful use of their property, and the inconvenience to hem and the congregation was such as to materially interfere with the use and enjoyment of it, and that the defendant's use of their property was not a natural and ordinary one, but a non-natural and extraordinary, though apart from the question of nuisance not an unlawful one.

Per ROSE, J.—Even had the plaintiffs not complained to the former proprietors of the rink that would be no legal answer on the part of the defendants.

Judgment of Meredith, J , affirmed, though slightly varied.

McCarthy, Q.C., and *A. McLean Macdonell*, for the appeal. *Beck*, contra.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 7.

ARMSTRONG *v.* HARRISON.

Deed to trustees of temperance society—Construction—Estate taken—Intention—Locality of habitation—New trustee—Appointment—Injunction.

A. by deed granted certain land to B. C. & D., trustees in trust for (three mperance societies) and their successors representatives of the aforesaid or e representatives of the societies of any temperance society by whatever ame . . . . known or designated. Together with all . . . . the tate, right, title . . . . of him his heirs and assigns. . . . To have nd to hold . . . unto the said parties . . . and their successors in rust for said societies. . . .

Held, that B. C. and D. took only a life estate for their joint lives and the ife of the survivor of them leaving the reversion in fee in the grantor.

Held, also, looking at the situation of the premises and the uses for which they were intended and that the temperance societies originally named were all formed in a certain town that the trust was intended to be confined to temperance societies having the same local habitation.

Held, also, that the plaintiff R. having been appointed a trustee for such a society although no such appointment could extend or prolong the life estate granted was entitled to restrain the defendant, his co-trustee and the sole surviving trustee under the deed, from pulling down a building on the premises.

Judgment of the County Court of Halton reversed.

H. S. Osler, for the appeal. *Bicknell*, contra.

Armour, C.J., Falconbridge, J., and Street, J.] [Feb. 10.

MINHINNICK *v.* JOLLY.

Fixture—Negotiations for sale—Intention to sever from freehold—No actual severance—Subsequent purchaser of freehold, rights of.

The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another even if communicated to one who becomes a subsequent purchaser of the freehold would not operate to convert a part of the freehold (the fixture) into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser. Judgment of Meredith, J., reversed.

Aylesworth, Q.C., for the appeal. *N. W. Rowell*, contra.

Divisional Court.] EWING *v.* CITY OF TORONTO. [Feb. 14.

Municipal corporation—Sidewalk—Repairs—Accident—Negligence.

In a sidewalk on one of the streets of the City of Toronto, there was a trap door leading to a cellar of abutting premises, about eight feet long, but divided in the centre into two parts, and opening therefrom, having three hinges on each half. fastened to the door by straps or flaps, which were half an inch above the level of the door, the movable part of the hinge extending an inch or an inch and one sixteenth above the level of the sidewalk, and being of the same length as the width of the flap, and about three-quarters of an inch in width. After nightfall, on a not dark night, the place also being lighted by an electric lamp on the opposite corner of the street, though the plaintiff's body, and the shadow from it to some extent obstructed the light, the plaintiff while walking on the sidewalk, struck his toe against one of the centre hinges, stumbled and fell, injuring himself. The plaintiff was well acquainted with the locality, having passed over the place at least once or twice a day for the previous three years.

Held, that there was no liability imposed on the city; for that the existence of the hinges, having regard to the purpose for which they were placed where they were, and the other circumstances of the case, did not constitute a breach of the defendant's statutory duty to keep in repair. *Ray* v. *Corporation of Petrolia* (1874) 24 C.P. 73, considered.

John McGregor, for plaintiff. *Lount*, Q.C., for third party defendant. *Fullerton*, Q.C., for corporation.

C. P. Div.] REGINA *v.* GRAHAM. [Feb. 14.

Conviction—Removal into High Court by certiorari—Application to take affidavit off files—Costs—Crim. Code, ss. 897, 898.

The cost referred to in ss. 897, 898 of the Criminal Code are those dealt with by the General Sessions of the Peace, when a conviction or order is affirmed or quashed on appeal to it; but not the costs of an unsuccessful application to a Judge of the High Court to take an affidavit off the files, after a conviction has been moved by certiorari into the said court. After the remo-

certiorari of a conviction of the defendant into the High Court, the rate, who had made the conviction, moved to have an affidavit filed by endant, removed from the files of the court, which was refused with ayable by the magistrate to the defendant; but subsequently under the hat ss. 897, 898 of the Code applied, the defendant obtained an ex parte varying the previous order by making the costs payable to the clerk of ice, and then to the defendant. An appeal to the Judge of the High sitting in Weekly Court, was dismissed; but an appeal therefrom, and leave, direct from the amended order, was allowed, and the order set The Judge of the High Court sitting in Weekly Court has no power to in an appeal of this kind.

uVernet and *Woods* for the police magistrate. *Murphy*, Q.C, contra.

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ahon, J.] DAVIS *v.* TAEGER. [March 4.

ty for costs—Plaintiffs out of the jurisdiction—Judgment by default—efendant allowed in to defend on terms.

he plaintiffs, in an action to recover $4,500 upon a bond, resided out of isdiction, and the writ of summons was so endorsed. The defendant ed, but failed to deliver a statement of defence, and judgment for the ffs was entered upon default, which the defendant moved to set aside, order was made allowing the defendant in to defend on terms of pay- sts, paying $100 into Court to answer plaintiff's future costs, and ing further that the judgment and execution issued thereon should stand rity for the plaintiffs' claim. The defendant paid the costs and paid the nto Court, and then delivered a statement of defence, and issued and a præcipe order upon the plaintiffs for security for costs, which the ffs moved to set aside.

Tyld, for the motion, contended that the defendant, being allowed in on was now the actor, and was not entitled to security, citing *Doer* v. *Rand*, R. 165; *Exchange Bank* v. *Barnes*, 11 P.R. 11; *Thibaudeau* v. *Herbert*, R. 420; *Walters* v. *Duggan*, 17P .R. 359.

V. Sinclair, for the defendant.

præcipe order set aside with costs.

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ur, C.J., Falconbridge, J., Street, J.] [March 7.

REGINA *v.* HOLMES.

nal law—Criminal Code, s. 210—Neglect to support wife—Former mar- age—Proof of death of first husband—Conviction.

he defendant on the complaint of his wife was convicted under sub-sec. s. 210 of the Code of refusing to provide necessaries for her. The ce showed that the parties were married in 1890, but that the complain- d been married to one W. in 1886, though she had never lived with him; n 1888 she had received a letter stating he was dying in the United , and that that was the last she heard of him, save that about a year er marriage to H. she again heard that he was dead.

No further proof of the death of the first husband was given.

Held, that there was evidence to go to the jury of the death of the first husband, and that the defendant was properly convicted.

J. R. Cartwright, Q.C., for Crown. *J. M. Godfrey*, for defendant.

Rose, J.] [March 7.

IN RE MCGILLIVRAY AND CHESTERVILLE PUBLIC SCHOOL.

Public schools—Dissolution of Union school section—Power of arbitrators—59 Vict., c. 70, O., ss. 43, 44.

Proceedings having been taken under the provisions of The Public Schools Act, 1896, 59 Vict., c. 70, O., for the dissolution of the Union school section hereinafter mentioned, arbitrators appointed by the county council under s. 44 of the Act, provided by their award that "Union school section No. 8 of Winchester Township, comprising the incorporated village of Chesterville and rural section No. 8 in said township, be dissolved, and that all the parcels of land included within the boundaries of rural section No. 8 be attached to and form the same for school purposes, and that all the parcels of land included within the boundaries of the village of Chesterville shall remain attached to and form the urban section of Chesterville village for such purposes.

Held, that though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation subject to the provisions of ss. 53 & 54 of the Act, and school section No. 8 as a non-union school section subject to the provisions of certain other sections; and that the award was valid as an exercise of power under sub-secs. 5 or 6 of s. 43.

Aylesworth, Q.C., for the motion to set aside the award. *B. C. Clute*, Q.C., and *Hilliard*, contra.

Meredith, J.] ORFORD *v.* FLEMING. [March 21.

Solicitor—Charging order—Rule 1129—"Property"—Judgment—Assignment—Notice—Taxation of costs—Sale of judgment.

An application made under Rule 1129, by the solicitors who obtained on behalf of the plaintiff a judgment in the High Court for the recovery of money from the defendant, for an order charging their costs upon the judgment debt. Previous to the application the judgment had been assigned by the plaintiff to the mother of the defendant. Rule 1129 is new in Ontario, and is as follows:

"1. Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a judge thereof, to declare such a solicitor . . . to be entitled to a charge upon the property, of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; and upon such declaration being made, such solicitor . . . . shall have a charge upon and against and a right to payment out of the property so recovered or preserved, for the taxed costs, charges and expenses of or in reference to such a cause, matter or proceeding: and all conveyances and acts done to defeat, or which may operate to

feat, such charge or right shall, unless made to a bona fide purchaser for lue without notice, be absolutely void and of no effect as against such charge right.

2. The court or judge may make such order for taxation of such costs, arges and expenses, and for the raising and payment of the same out of the d property as may seem just. . . ."

Held, following *Birchall* v. *Pugin*, L.R. 10 C.P. 397, that the judgment bt was "property" within the meaning of the Rule.

Held, also, upon the facts, that the assignment was not to a bona fide rchaser for value without express notice; but, even if there were no express tice, the assignee must, following *Cole* v. *Eley* (1894), 2 Q.B. 180, be ken to have notice of the solicitors' lien, for she was buying a judgment debt, d the implied notice she would have would be notice within the meaning of e Rule.

An order was made for the taxation of the costs of the action and of this plication, declaring the applicants entitled to a charge upon the judgment for e amount which should be taxed, and directing that such amount should be sed and paid out of the judgment by a sale thereof.

W. R. P. Parker, for applicants. *Coatsworth*, contra.

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eredith, J.] WINCH *v.* TRAVISS. [March 23.

rrest — Discharge — Failure to deliver statement of claim—Rule 1044—Extension of time—Rule 353—Terms.

Under the present practice there is power, after the expiration of the time pointed by Rule 1044 for the delivery of the statement of claim, where a fendant is detained in custody under an order for arrest, to extend the time. he case is within Rule 353, and the wording of Rule 100 of the Rules of inity Term, 1896, has been altered from "shall have been given" to "is ven" in Rule 1044.

Where the statement of claim was delivered two days after the month d expired, and the defendant moved for his discharge, an order was made lidating it for all purposes, upon terms as to speedy trial and payment of sts.

C. C. Robinson, for the plaintiff. *C. Millar*, for the defendant.

ASSESSMENT CASES.

artnell, Co. J.] GRAND TRUNK RAILWAY CO. *v.* PORT PERRY.

Assessment—Railways—Tank and platform—Sub-tenant.

Appeal from the Court of Revision of the village of Port Perry.

Held, water tanks and platforms are part of the superstructure of a railay and are not assessable.

2. The assessment of a sub-tenant of a railway company should be educted from the total assessment.

E. Donald, for appellants. *Yarnold*, for respondent.

Dartnell, Co. J.] HARRIS *v.* TOWNSHIP OF WHITBY.

Assessment—Parsonage.

Appeal from the Court of Revision of the township of Whitby.

In 1885 two acres of land were conveyed to the Church Society in trust for a churchyard and burial ground for the use of the members of the Church of England. A church and subsequently a parsonage were erected thereon.

Held, that since 1890 the parsonage and a reasonable curtilage surrounding it were liable to taxation for municipal purposes.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] NORTH SYDNEY MINING CO. *v.* GREENER.

Equitable execution—Application for appointment of receiver by way of, under R.S.N.S. c. 104, s. 13, s.-s. 7—Mere convenience not sufficient ground—O. 40, Rules 34, 35.

Application for a receiver by way of equitable execution to realize an amount due to the defendant as mortgagee (the mortgage being not yet due). Under R.S. N.S., c. 104, s. 13, s.-s. 7, enabling the court to appoint a receiver in all cases in which it shall appear to "be just or convenient" to do so. Under R.S. N.S. c. 104, Ord. 40, R. 34, 35, the sheriff may take mortgages in execution and either collect them in his own name, or assign them to the creditor in satisfaction of the execution.

Held (refusing the application), that the provision enabling the court to appoint a receiver did not alter the law which existed before it was passed as to the circumstances in which a receiver would be appointed, and that it would not do so merely because it would be a more convenient way of obtaining satisfaction of a judgment than the usual mode of execution. *Harris* v. *Beauchamp Brothers* (1894), 1 Q.B. 801. *Holmes* v. *Millage* (1893) 1 Q.B. 551. *Manchester Banking Co.* v. *Parkinson*, 22 Q.B.D. 173. Cases decided in respect to a similar provision in England followed. [See also *Pacific Investment Co.* v. *Swann*, ante p. 107.]

W. A. Henry, for plaintiff. *F. Mathers*, for defendant.

ıll Court.] [Jan. 15.

MCLEOD *v.* THE INSURANCE CO. OF NORTH AMERICA.

Iarine insurance—Policy on hull and freight—Acceptance of abandonment —Admission of right to recover—Duty of company undertaking to repair —Owner prejudiced by—Right of owner to inspect work—"Boston clause" —Construction—Evidence—Matters peculiarly for jury—Authority of master and consignee superseded by arrival of special agent—Proofs of loss—Right of court to supply finding—Substantial wrong or miscarriage must be shown—O. 37, R. 6.

The brigantine "Hattie Louise," owned by plaintiff and insured by the efendant companies under policies on the hull and freight, left Trinidad for ineyard Haven with a cargo of molasses. Shortly after leaving port she ncountered heavy weather, and put into the port of St. Thomas, W. I., in a eaky condition.

A survey was called which resulted in the cargo being ordered to be dis-harged and stored, and the vessel placed upon the slip for repairs, but before nything was done under the surveyors' report, J. B., an agent of the defendant ompanies, and W. H. B., the plaintiff's agent, arrived at St. Thomas by the ame vessel, and several interviews took place with a view to determining hat course should be pursued. This resulted in a disagreement, the plain-ff's agent insisting that the cargo should be trans-shipped, and the vessel ken to a northern port, after making temporary repairs, while the agent for e insurers insisted upon the vessel being permanently repaired at t. Thomas, and carrying her own cargo forward. Notice of abandonment as given on December 28th by letter addressed to the defendant companies. consequence of the failure on the part of the agents to come to an agree-nt, the plaintiff's agent withdrew from the project of repairing the vessel, d the work of effecting repairs was proceeded with by the defendant's gent. After the vessel was taken off the slip and the cargo reloaded, it was ound that the vessel was still leaking badly, and was unseaworthy, and that it would be necessary to again discharge the cargo. At this time the disburse-ment account had run up to $4,014.48, and the vessel, which was valued in the first instance at $6,000, had not been re-metaled or re-classed. An attempt was made to raise money on bottomry, but failed on account of the leaky con-dition of the vessel, and as the consignees refused to allow the cargo to be discharged a second time, until the claims were paid, she was finally sold under process to recover the claims. The policies contained what is known as the "Boston clause," under which it is stipulated that "the acts of the sured or insurers in recovering, saving, and preserving the property insured, case of disaster, shall not be considered a waiver or acceptance of the andonment." The jury found among other things that there was an accept-ce of the abandonment.

Held, 1. The underwriters having intervened for the purpose of making ermanent repairs the repairs must be thorough and made within a reasonable me; otherwise they must be held to have accepted the abandonment.

2. The clause in the policy was applicable rather to cases where the owner neglects or refuses to save the ship than to cases where he is going on with the project of saving her.

3. The owner was clearly prejudiced by the interference of the defendant's agent as the expenses of repairing at St. Thomas were excessive, and the vessel could not be re-metaled or re-classed there, whereas if she had been taken to a northern port as proposed by plaintiff's agent the repairs could have been better effected and at half the cost.

4. The case being one in which there was obscurity and evidence of a contradictory character was peculiarly one for the consideration of the jury and upon which they were especially competent to pass. And their findings were such as reasonable men might have found.

5. The authority of the master and consignees to bind the owner was superseded by the arrival of the plaintiff's agent at St. Thomas, and that if the consignees, after the agent's arrival, accepted the tender for repairs, express authority to do so must be shown.

6. Where repairs are made by the underwriter the owner has the same right to have someone superintend the work that the underwriter has where the repairs are made by the owner.

7. The Court will not set aside a verdict for misdirection unless there has been some substantial wrong or miscarriage (O. 37 R. 6).

8. Proofs of loss are not necessary when the loss need not amount to anything to entitle the plaintiff to recover.

9. Acceptance of the abandonment is an admission of the plaintiff's right to recover.

10. When the party with whom the contract is made is identified as the party insured there is not the same reason for requiring proof of interest as where the insurance is effected "for whom it may concern."

11. The finding of the jury that each company by its conduct, reasonably led plaintiff to believe that formal proofs of interest and loss and adjustment were not required, and the evidence showing that defendants' agent, who was present at St. Thomas, knew more about the loss than the owner did, was a reasonable finding.

12. On the authority of *Manufacturers Ins. Co.* v. *Pudsey*, that if the answer as to waiver was defective, because the authority of J. B., who purported to act as agent for defendants, was assumed, the Court could deal with the matter and supply a finding as to waiver.

13. There having been an agreement that the trial Judge should submit to the jury "such questions as he decided were proper to be left to the jury." It was held with respect to a question which it was contended the Judge should have submitted, that the question should have been formally offered, and a ruling had upon it, and a note made of the fact.

R. E. Harris, Q.C., and *R. C. Weldon*, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

Court.] WEATHERBE *v.* WHITNEY. [Jan. 22.

act for sale of coal mining areas—Plaintiff not entitled to recover lleged price but only damages occasioned by breach—Arrest of defendant Order for set aside—Claim that equitable title passed—Affidavit held in-ufficient to support—Where perfected and completed sale is alleged it need ot be alleged further that title passed.

Plaintiff brought an action against defendant for the breach of a contract e sale of a certain coal mining property, claiming among other things the ic performance of the alleged agreement, or, in the alternative, damages e non-performance thereof. Subsequently to the bringing of the action iff procured an order for the defendant's arrest on the ground that he was to leave the Province, and that unless he was forthwith arrested the debt l be lost.

Held, (affirming on this point the judgment of Ritchie, J., setting aside the) that the breach of an agreement for the sale of a mining right does not e the vendor to recover the purchase money, but only to damages ioned by the breach.

t was contended on the part of plaintiff that the equitable title to the passed by the agreement, and that this was sufficient to entitle plaintiff e for the price of the areas.

Held, that even if this were true, as the only allegation in plaintiff's affi- was that defendant signed by his agent, and not that he himself signed a or memorandum of the agreement, this not being an equitable action for ic performance but a common law action to recover a certain sum of y, the alleged price of the areas, that plaintiff could not succeed on that nd in upholding his proceedings.

Held, further, on the authority of *Hargreaves* v. *Hayes*, 5 E. & B. 272, rsing on this point the decision appealed from) that it was not necessary laintiff, in his affidavit, in addition to alleging a perfected and com- d sale of the coal mining areas to defendant, to allege that the title ed.

W. B. A. Ritchie, Q.C., for appellant. *W. B. Ross*, Q.C., for respondent.

Court.] FULTON *v.* THE KINGSTON VEHICLE CO. [Jan. 22.

gnment and confession of judgment—Induced by threat of criminal prose-cution—Held not ground for setting aside in absence of agreement express or implied to abandon proceedings—Where debtor or delinquent is himself seeking to avoid contract—Held distinguishable—Threat to do that which may lawfully be done—Held not to be duress.

Plaintiffs sought to set aside a deed of assignment made by A. R. F. to defendant F. in which the defendant company were preferred creditors, also a judgment confessed to the defendant company at the same time, he grounds that A. R. F. was induced to make the assignment and confess judgment, (1.) under threat of criminal prosecution; (2.) by an agree- t on the part of defendants to stifle such criminal prosecution if their and was complied with. A large number of questions were submitted to

the jury, all of which were answered in plaintiff's favour, with the exception of the 8th, which was as follows: "Whether there was any understanding between the defendant company or its directors and A. R. F., either express or implied, to abandon the criminal prosecution if the assignment and warrant to confess judgment were executed," to which the jury answered "No."

Held, that in the absence of such understanding or agreement the mere fact that threats of a criminal prosecution were employed to induce A. R. F. to give security for a debt admittedly due, and compliance on his part in fear of arrest for the alleged offence, were not enough to invalidate the security given under such circumstances.

Semble, that the case where the debtor or delinquent is himself seeking to avoid his contract is distinguishable from the case where the security is given by a third party in fear of or to save from criminal prosecution a near relative.

Semble, that where the threat is only to do that which may lawfully be done, as a threat of a lawful imprisonment, there is no duress.

H. A. Lovett, for appellants. *R. L. Borden*, Q.C., and *H. McKenzie*, for respondents.

Townshend, J.] PITFIELD *v.* GUEST. [March 11.

Fraudulent assignment—Particulars of fraud.

This was an action of replevin against the Sheriff of Yarmouth. The defendant pleaded, inter alia, that the deed of assignment under which the plaintiff claimed (*a*) was made "for the purpose and with the intent to defraud, hinder and delay the creditors of the grantor, etc." and (*b*) that the deed "is void under 13 Eliz. c. 5, as hindering and delaying creditors." The plaintiff moved under Order 19, Rule 7, for further and better particulars of the fraud pleaded as aforesaid, citing *The Rory*, 7 P.D. 121, and *Wallingford* v. *Mutual Society*, 5 App. Cas. 701.

Held, that the particulars sought must be refused with costs. The plea of purpose and intent has a well settled meaning and indicates all that can reasonably be asked. It is not such a general allegation of fraud as is mentioned in the cases cited by the applicant. It is as definite as is necessary. The defence of the statute 13 Eliz. is specifically set up, and what that defence means and the evidence required under it are too well known to take anyone by surprise.

J. A. Chisholm, for the motion. *Ernest Gregory*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] CARRUTHERS *v.* HAMILTON PROVIDENT. [March 5.

Mortgagor and mortgagee—Negligence in exercising power of sale.

Appeal from decision of Bain, J., noted ante p. 51, dismissed with costs, but verdict reduced by $200.

C. H. Campbell, Q.C., for plaintiff. *J. S. Ewart*, Q.C., and *A. D. Cameron* for defendant.

Court.] CRAYSTON *v.* MASSEY-HARRIS CO. [March 5.

County Courts—Jurisdiction—Extent of—Equitable relief.

County Court appeal. The plaintiff sued to recover back money paid by to the defendant company under stress of a seizure of his crop by the ff, and for damages for trespass to goods. It was shown at the trial that plaintiff had given the company by mistake a chattel mortgage for an unt larger than he really owed them, and that at the time the bailiff made demand the plaintiff really owed the company nothing; that the plaintiff e a bond for the forthcoming of the goods to induce the bailiff to withdraw subsequently sold enough of the grain and paid the amount demanded. ntiff had a verdict for the amount overpaid and $10 for the trespass.

Held, that County Courts in Manitoba have no jurisdiction to rectify ten instruments for fraud or mistake or to entertain an action for the very of money paid under the strict terms of such an instrument. o of the County Courts' Act only gives jurisdiction in personal actions, and limitations as to amounts show that purely money demands are contemed. If equitable claims are to be entertained at all they must be equitable ts or demands of cognate character to legal ones coming under the terms l. The plaintiff was liable at common law for the full amount of the mort- e he had signed and sealed. A recital in it estopped him and he could e had no defence to an action on the covenant for the full amount, and the nse to seize the grain would have been an effectual defence to any on of trespass. Money paid under such a contract could not have n recovered back at law; and the County Court, having to right no rescind rectify the chattel mortgage or to declare it satisfied, could exercise an equitable jurisdiction to adjudge re-payment of the money: *ter* v. *Reeves* (1892), 1 Q.B. 255. The provision in section 70 of "The nty Courts' Act," that the judge "may make such orders, judgments or rees thereupon as appear to him just and agreeable to equity and good science," does not authorize him to give the relief that the plaintiff would entitled to in a court possessing general equitable jurisdiction. It and sec- 71 come under the heading "Practice and Procedure," and only apply to ers and decrees in actions within the jurisdiction of the court as defined by ion 60, and deal only with the practice and procedure in such actions, and the manner in which the judges are to dispose of such actions at the trial: *ens* v. *McGilligat*, 23 U.C.C.P. 171. The jurisdiction of the County rt being confined to personal actions which constitute one of the three sions into which civil actions maintainable in the old common law courts e divided, and it being a rule of construction that when technical words used in reference to a technical subject, they will prima facie be underd to be used in the sense they have acquired in that subject, it is open to stion if the legislature intended to give jurisdiction to entertain any causes action but such as might have been sued for as personal actions in the rts of common law; and at all events the words do not include a claim to rm or cancel a deed for fraud or mistake. Appeal allowed with costs, and -suit entered in the County Court.

Howell, Q.C., for plaintiff. *Culver*, Q.C., for defendant.

Dubuc, J.] RITZ *v.* SCHMIDT. [March 11.

Practice—Service of process—Leave to defend—Setting aside judgment.

Motion by the defendant Frose to set aside the judgment recovered by plaintiffs against the defendants by default for possession of a farm and a writ of hab. fac. poss. and the proceedings and delivery of possession thereunder. The plaintiffs bought the land in question at a sale held by order of the Court in a suit commenced by one Russell to realize the amount of a judgment against the defendant Schmidt, and had obtained an order to the Court vesting the title in them ; but, as defendants had refused to give up possession, this action was necessary. Defendants made affidavits that they had never been served with any statement of claim and had no knowledge of the proceedings in this action. They also denied service of any papers or notices in the former suit in which the vesting order had been made, and claimed that the same had never in any manner been brought to their knowledge and that they had a good defence to the action on the merits ; that the land in question was the homestead of the defendant Schmidt before he conveyed it to the defendant Frose ; and that the land was exempt from sale under legal process. The affidavit of service on the defendants stated that true copies of the statement of claim had been personally served on the defendants by delivering the same to, and leaving the same with, the defendants respectively at their houses and that they refused to accept the same and the bailiff left the copies at the houses on the land described in the affidavits.

Held, on the authority of *Thompson* v. *Pheney*, 1 Dowl. 441, that personal service requires that the process should be shown to have come to the notice of the person to be served, or that he has been informed of the nature of the process, when it will be sufficient to throw it down before him and leave it there; and, as such was not shown to have been done in this case, the service was not effectual, more especially as the defendants were Mennonites, and did not understand English ; and that defendants should be allowed to put in their defence to the action within fifteen days.

The evidence disclosed on the affidavits as to the merits of the defence raised not being satisfactory or convincing.

Held, following *O'Sullivan* v. *Murphy*, 78 L.T. 213, that none of the proceedings should be set aside in the meantime, and plaintiffs should be allowed to remain in possession of the property. Costs of the application reserved until after the trial of the action.

Phippen, for plaintiffs. *Wilson*, for defendants.

HUTCHINGS *v.* ADAMS.

Principal and agent—Assignment for creditors—Sale of goods.

Appeal from a County Court. One Pifer, who had been carrying on a business as a general trader in Oak Lake, being in embarrassed circumstances, made a transfer of his stock in trade and other property to the defendant in trust for certain creditors, and a written agreement was entered into between Pifer and the defendant which provided among other things that the former

remain in charge of said business and carry it on for and on behalf of endant in accordance with instructions received. It did not appear that ecific instructions as to the purchase of new goods were given, but it to have been contemplated by the defendant that some new goods have to be ordered from time to time to enable Pifer to clear out the old Pifer then remained in charge and in his own name purchased from intiff goods such as would reasonably be required in the business, e Judge of the County Court found that the goods had been ordered for l business.

eld, following *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598, and *Watteau* v. *k* (1893), 1 Q.B. 349; that defendant had constituted Pifer as his l agent for taking charge of and carrying on the said business, and was o the plaintiff for the price of the goods furnished by him. *Hechler* v. *k*, 22 S.C.R. 489, distinguished. Judgment in the County Court affirmed peal dismissed with costs.

ugent, for plaintiff. *A. D. Cameron* and *Clark*, for defendant.

ALLAN *v.* M. & N. W. R. CO.

ctice—Receiver—Ex parte application—Trustee and cestui que trust.

his was a motion made by two holders of bonds issued by the defendant ny, and secured by a mortgage made to Grey and Heron, the plaintiffs second suit, as trustees for leave to bring an action to administer the of the mortgage deed, for a declaration that the power of sale and other s contained in that deed are valid, and for a declaration of the true con- on of the mortgage as to certain matters. The mortgage covered a por- the line of the defendant's railway, known as the first division; but as f it is beyond the province it had been decided that the court had no ction to order a sale. Receivers of the profits, tolls and revenues of the y had been appointed in the respective suits, but they were not in posses- f any part of the company's property, and had nothing to do with the gement of the railway. The trustees Grey and Heron had formerly d to the court, and got leave to take certain proceedings which they had but without any practical result to the bond holders, beyond the appoint- of separate receiver for the first division. It was deemed necessary to the present application because the railway would have to be made a to the action to be brought, and receivers had been appointed in the actions.

leld, that leave should be granted as asked, and that the applicants were ecluded from bringing an action for the administration of the trusts on nt of anything done by the trustees; also that no notice of the applica- eed be given, as the receivers were not in any sense in possession of any f the company's property.

Howell, Q.C., for applicants.

Province of British Columbia.

SUPREME COURT.

Davie, C.J., Walkem, J., Irving J.] [Feb.

RE QUAI SHING, AN INFANT.

Custody of infant—Rights of adoptive parent—Welfare of child.

Quai Shing, a Chinese girl of about 14 years of age, was taken from her country folk against her will and placed in the Refuge Home at Victoria, B.C. An application for habeas corpus by her former Chinese custodian was refused by Drake, J. The applicant appealed and the appeal was heard before Davie, C.J , Walkem, J. and Irving, J.

Held, following *R.* v. *Nash*, 10 Q.B.D. 454, and *Ah Guay's Case*, 2 B.C. 343, that neither the applicant, who is neither parent nor guardian, but has adopted the child at a tender age at request of a relative in whose care she had been committed, nor the respondent, the matron of the Refuge Home, are entitled in law to the custody and possession of the child. In all such questions the benefit or welfare of the child is of primary importance. Both parties being in the eye of the law strangers, the Court will act on its opinion as to what is best for the child.

Per DAVIE, C.J., dissenting, that while an adoptive parent has no status as against parent or guardian, yet as against strangers interfering the adoptive parent is a person having the lawful care or charge of the child of his adoption, so as to make it illegal to take the child out of his custody, unless on account of moral turpitude or the like.

Appeal dismissed.

Walkem, J.] CONNELL *v.* MADDEN. [Feb.

Mineral claim—Initial post.

A prospector staked a claim on the international boundary, some of the stakes being in British Columbia, and some, including the initial post, on American soil.

Held, that a post thus planted in a foreign country could not be a boundary post within the meaning of any of the Mineral Acts, and the location is invalid.

Walkem, J.] [Feb.

ESQUIMALT & NANAIMO RAILWAY CO. *v.* NEW VANCOUVER COAL CO.

Inspection of mine.

Plaintiffs claim to be the owners under Dominion and local legislation, and under a Crown grant, of all the coal beneath Nanaimo harbour. There is no dispute as to the place under the harbour where defendants are taking out coal. Plaintiffs having commenced proceedings for purpose of asserting its title to the coal lands in question.

Held, following *Bennett* v. *Whitehouse*, 29 L.J., c. 326, that the plaintiffs are entitled to order asked for, as they are entitled to know the extent and manner of the work being done on giving undertaking as to damages, and that information gained will be used only for purposes of the action. Plaintiffs to pay expenses of inspection.

Book Reviews.

Judicial Trustees' Act, 1896, with notes of practice cases in Scotland on the Judicial Factors' Act, with the rules issued under the Act of 1896, and appendix giving the Trustees' Acts in England and an epitome of Colonial Acts, by GERALD JOHN WHEELER, M.A., LL.B., of Lincoln's Inn. London, Butterworth & Co., 7 Fleet St., Law Publishers, 1898.

This book is, of course, peculiarly useful in England, but the cases cited will help to illustrate the law as it stands in this country. These cases, by the way, are largely Scotch decisions, on the Judicial Factors' Act, which gives the peculiarity of an English book illustrated by Scotch cases. The reference to public trustees in the colonies is interesting and gives a bird's eye view of the progress of legislation on the subject in various parts of the Empire.

A Summary of the Principles of the Law, by CLAUDE C. M. PLUMITRE, Middle Temple, barrister-at-law, etc. Second edition. London: Butterworth & Co., 7 Fleet street, Law Publishers, 1897.

In this very useful little work of 270 pages, the author summarizes by means of rules and sub-rules those principles of the law which are applicable to the formation of a simple contract, and to the rights and obligations attaching thereto, illustrating the application of these rules by examples taken from leading cases. As the author correctly states, any attempt to summarize so extensive a branch of law, is full of difficulties, but certainly the author has done his work remarkably well, giving a very valuable introduction to more advanced reading, such as the works of Pollock, Anson and Addison give in more extended form. This is a book which might well be added to the curriculum of the Law School, being cheap as well as good. Price, 7s. 6d.

The Law relating to unconscionable Bargains with Money Lenders, by HUGH H. L. BELLOT, M.A., B.C.L., and R. JAMES WILLIS, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Temple Bar; 1897; 130 pp.

Books on special subjects are the order of the day. We have got pretty well to the end of usury laws, but this book has its use even now. The first part is devoted to a sketch of the origin and history of usury, and a discussion on usury at common law, prior to the statutes regulating usurious transactions. The more practical part of the book begins with chap. 3, which treats of the equitable doctrine giving relief in case of heirs and expectants, dealing with their expectancies as enunciated by the leading case of *Earl Chesterfield* v. *Janssen*. An appendix gives the various leading cases decided since the case above referred to. Questions do not often in this country arise in connection with the subject treated of in this book, but this collection of the authorities will make it useful, and save time when the occasion requires.

Principles of the Law of Consent, with special reference to criminal law, including the doctrines of Mistake, Duress and Waiver; by HUKM CHAND, M.A., author of "Res Judicata." Bombay Education Society's Press. 1897.

A writer who, in these days of specialized dissertations upon concrete subjects, gives us a treatise upon one of those elementary concepts which constitute the framework around which the entire structure of the law has been built, is performing an extremely meritorious and useful task. The most recent essay in this direction emanates from the far east, and is written by a native of India, a quarter of the globe from which we have not hitherto learned to look for much enlightenment in matters of this sort. The topic chosen involves the investigation of some of the most difficult and unsettled problems of jurisprudence, and to the solution of these the learned author has contributed most valuable aid. In carrying out his scheme he has, with remarkable industry, drawn not only upon that great storehouse of legal lore, the English and American reports, but also upon the disquisitions of the civilians of Continental Europe. It would require more space than we have at our disposal to furnish our readers with any more definite idea than this of the contents of Mr. Chand's volume. Nor are we disposed, in a case where there is so much that is deserving of praise, to essay the ungracious task of criticizing the author's style, which is often rather obscure and inartificial. We shall merely say that, in our own opinion, this work merits the favourable attention of the profession as a very cleverly arranged collection of information which it would be extremly difficult to procure without its assistance.

COUNTY OF YORK LAW ASSOCIATION.

At the annual meeting of the County of York Law Association, held in library on January 31st, 1898, the following report was submitted:

There are at present 333 members of the association, and 294 members ve paid their fees for the year 1897. During the year sixteen practitioners came members. One member died, and forty-seven members severed their nnection with the association by removal from the county, or resignation, or being posted under the rules for non-payment of fees. There are now 424 volumes in the library, 203 having been added during the year, made up follows: Reports and Statutes, 71 volumes; Texts and Digests, 60 volumes; ound periodicals, 42 volumes; miscellaneous, 30 volumes. The most import- t addition during the year comprised Cartwright's Constitutional Cases. he value of the books in the library is now estimated as follows: Reports d Statutes, $7,705.08; text books, $2,833.26; periodicals, $1,462.57—total, 2,000.91. Insurance to the extent of $10,000 has been effected upon the rary and property of the association. Following a custom of our past esidents, a portrait of Mr. Shepley, Q.C., president for the year 1896, has en presented to the association by Mr Ritchie, Q.C., the retiring president.

The work of consolidating the Rules of Practice was completed during e past year. The changes suggested by the commissioners appointed to nsolidate these Rules was submitted to the Committee upon Legislation, ppointed at the last annual meeting. That committee gave a great deal of ne and consideration to the memorandum, and made an elaborate report to e commissioners. This was followed by an interchange of views between e committee and commission, and the adoption of a large part of e suggestions made by the committee. The members of the association nd the profession at large are much indebted to the members of the Legisla- on Committee for the time and attention which they so willingly and without emuneration gave to the consideration of the serious changes involved in the consolidation. The attention of the association is again called to the approaching completion of the court house in Toronto. Without doubt the present accommodation afforded the library will not be available any length of time. The trustees understand that provision is not being made for the imme- diate accommodation in the new building, which will be available for a library and reading rooms. The board trust that their successors will take up the question with a view to seeing that the provisions of the statute which require accommodation to be furnished in the court house for the association, are fully and fairly complied with. The trustees record the death during the year of the following member: Mr. W. G. Murdoch.

After this report was submitted and adopted the following officers were appointed for the ensuing year:—President, Wm. Mortimer Clark, Q.C.; Vice-President, J. H. Macdonald, Q.C.; Treasurer, Walter Barwick; Curator, Angus MacMurchy; Secretary, Shirley Denison. Trustees:—J. B. Clark, Q.C., R. J. Maclennan, W. E. Middleton, D. W. Saunders, D. Fasken, C. D. Scott. Auditors:—H. M. Mowat, Goodwin Gibson. Committee on Legislation:—John Hoskin, Q.C., LL.D., E. D. Armour, Q.C., D. E. Thomson, Q.C., T Langton, Q.C., D. W. Saunders, Douglas Armour, W. H. Blake, W. E. Middleton, E. T. English, C. A. Masten.

LITTELL LIVING AGE, Boston.—No one who is interested in the best contemporary French literature can afford to miss the series of sketches and stories by Paul Bourget, which will begin in *The Living Age* for April 2. These sketches have been but recently published in France, and this is their first appearance in English dress. They are translated for *The Living Age* by William Marchant. They are extremely clever and characteristic.

THE HOME OF THE BRIEFLESS BARRISTER.

My friend, have you heard of the town of Nogood,
On the banks of the river Slow,
Where blossoms the Waitawhile flower fair,
Where the Sometimeorother scents the air,
And the soft Goeasys grow?

It lies in the valley of Whatstheuse,
In the Province of Leterslide;
And Thattiredfeeling is native there,
It's the home of the reckless Idon'tcare,
Where the Giveitups abide.

It stands at the bottom of Lazy hill,
And is easy to reach, I declare;
You've only to fold up your hands and glide
Down the slope of Weakwill's toboggan slide
To be landed quickly there.

The town is as old as the human race,
And it grows with the flight of years,
It is wrapped in the fog of idlers' dreams,
Its streets are paved with discarded schemes,
And sprinkled with useless tears.

Canada Law Journal.

OL. XXXIV. APRIL 15, 1898. NO. 8.

The practice indulged in by some judges of cross-examin-
witnesses too much is alluded to in the English *Law*
es. The writer says: "The judges, especially the very
ng and the very old, sin in this way because it is their
ire so to do." We would remark that human nature
ears to be much the same in Ontario as it is in England.

In the same publication appears a letter from an Irish
icitor calling attention to the legal business, and the loss
stained by successful suitors incidental to the practice of
dges taking upon themselves to measure the costs of
notions, instead of permitting these costs to be taxed in the
ordinary way, and very properly remarks that it is not only a
grievance, but a very powerful deterrent to the enforcement
of rights by the remedies prescribed by law; adding, that a
fresh point is given to Dean Swift's celebrated sarcasm, that
a man was hopelessly ruined in whose favour, as a litigant,
judgment had been pronounced "with costs."

The Canadian Annual Digest for 1897 is now ready for delivery to its subscribers; and from such an examination as we have been able to give it before going to press with the present number, we are of opinion that the standard of excellence that marked the issue for 1896 has been maintained throughout the present work. We observe that the editors, Messrs. Masters and Morse, have extended the scope of their labours in this issue for 1897 by digesting a large number of cases that are published in the CANADA LAW JOURNAL, the Canadian Law Times, and La Revue de Jurisprudence

which do not appear elsewhere. This new feature will meet with the approval of the profession at large. In announcing the first issue of this work, we expressed the view that the enterprise would commend itself to the profession as filling a great want under legal conditions as they exist in this country, and the hearty encouragement accorded the work has demonstrated that we were not mistaken.

BRITISH COLUMBIA BENCH.

The British Columbia Bar is permeated with a feeling of indignation at the suggested appointment of a barrister from another province to the Chief Justiceship of their Supreme Court bench. As a matter of abstract justice such a proposal is one which it is hard to defend, inasmuch as appointments in other provinces are secured to the provincial Bars, and the many barristers of high standing practising in the province at the Pacific coast have, therefore, no opportunity for advancement by way of transfer to a judgeship elsewhere. With so many able lawyers there it is utterly inexcusable to pass over the boundary to another jurisdiction to fill any judicial position, and it is always better that an appointee to the bench should be one who has by long practice and experience under the procedure of the province familiarized himself therewith.

It may also be doubted whether an appointment such as is suggested is constitutional. The Province of British Columbia entered Confederation in 1871, under an agreement that so much of the British North America Act as was not expressly excluded by the terms of the agreement should apply to that province as fully as if it had been one of the original parties.

Section 97 of the British North America Act is as follows: "Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure in the courts of those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor-

eral shall be selected from the respective Bars of those nces." This section is followed by another, which ex- ly provides, without any contingency, that the judges of ourts of Quebec, the only other party to the original ation, shall be selected from the Bar of that province. The and procedure are by no means uniform in any of the inces, but the uniformity intended is probably that ecting which provision is made by section 94.

A similar question arose in 1872 on the refusal of assent bill passed by the Manitoba Legislature for the establish- t of the Law Society of Manitoba, when it was considered section 97 of the British North America Act applied to province, and that the power should not be granted to then existing Bar to admit to practice such persons only might be thought fit by the representative association. reason then given was that it would be an attempt to ner restrict the Ottawa Government in their selection of ges, already limited to the Manitoba Bar, by reading sec- 94 into their agreement of federation, as it is submitted it uld now be applied to the agreement with British Colum-

Whatever may be the strictly legal aspect of the ques- it is to be hoped that Mr. Laurier's Government will see way to the appointment, as Chief Justice of British mbia, either the fittest of those now on the Supreme rt Bench of that province, or some member of their Bar, hich there are several well qualified for the position. In event it is most sincerely to be hoped that the selection be made without reference to political considerations. country demands and should have the best available for such positions, no matter what political party they ng to, and the leader who is strong and fearless enough omply with this demand will deserve well of his country.

OUR FEDERAL CONSTITUTION.

At various periods in the history of Europe, from the earliest records down to the present time, under the most varying conditions, and with varying success, attempts have been made to combine the maximum of strength in the central government with the maximum of freedom in the control of local affairs by local authorities. And what has been attempted in Europe has also been attempted in the offshoots of European nations in different parts of the world. The problem which the founders of the North American republic essayed to solve is the same which confronted the founders of the commonwealth of Rome in the earliest periods of its history, and in neither case can the solution be said to have been altogether satisfactory. The Swiss Federation was the work of statesmen in the Middle Ages, and we in Canada have only just completed a task of a similar character. In Australia and South Africa plans are being laid for federated governments, and these confederations will in time form the basis of the still greater confederation embracing not only the parent state but its colonial possessions all over the world.

That a subject of such great historical as well as political interest, and on which such vast practical issues depend, should be the theme of discussion in the press and on the platform, as well as of mature consideration by those charged with judicial functions and by writers able to give it the time and thought which its importance demands, was naturally to be expected. In Dr. Bourinot's "Federal Government in Canada," published in 1889, we have an historical sketch of the events which led up to Confederation, and of the principal features of the Constitution established by the British North America Act. In the work on parliamentary procedure and parliamentary government under the provisions of that Act by the same author, and in the great constitutional work of Dr. Todd, we have very full information as to the principles laid down in that Act, and the methods of constitutional procedure based upon them. Mr. J. R. Cartwright's collection of cases under the B.N.A. Act give the leading decisions of the courts

n various points of law which at different times have en; and we recently noticed Mr. Gerald Wheeler's voluminous collection of statutes affecting the subject of Canadian Confederation and our relation to the Mother Country, commencing with the British North America Act, to which are added decisions of the Judicial Committee of the Privy Council ing on the subject.

We have now before us a work of a somewhat different acter from any of the foregoing, entitled "Legislative er in Canada," by Mr. A. H. F. Lefroy, M.A., (Oxon.) ister-at-law, which comes most appropriately to complete literature on this subject.

Mr. Lefroy's primary aim in writing this book is, as stated he preface, "to extract from the reported decisions on the . A. Act all that is to be found therein of general application upon the law governing the distribution of legislative er between the Dominion Parliament and the various vincial Legislatures of Canada." Proceeding inductively author formulates the results arrived at in a series of eral propositions, giving the authorities upon which they as well as any decisions which appear to be at variance them. In an introductory chapter he contends that the eral constitution of Canada is similar in principle to that he United Kingdom, and then goes on to compare the ribution of legislative power between Congress and the slature of the several States, with that between the inion Parliament and the Provincial Legislatures.

The leading propositions as stated in this book are sixty-t in number. The following is a brief summary of the t important: The B. N. A. Act is the sole charter by ch the rights of the Dominion and Provinces respectively be determined, and from which alone each derive their ers. The prerogative of the Crown runs to the same nt in the colonies as in England, and is not lessened by B. N. A. Act, and the Lieut.-Governors of Provinces are much the representatives of Her Majesty for Provincial poses as the Governor-General is for Dominion. The wn is a party to and bound by Dominion and Provincial

statutes so far as they are intra vires, but no consent of the Crown can render valid an Act otherwise ultra vires. All powers of legislation given by B. N. A. Act are subject to the sovereign authority of the Imperial Parliament, and the Federal Parliament cannot amend the B. N. A. Act. But neither Dominion nor Provincial Parliaments exercise their power as delegates of the Imperial Parliament, but, within the limits of the powers conferred, are supreme, and the exercise of that power is not controlled by consideration for private rights. The Parliament of Canada cannot, under colour of general legislation, deal with what are Provincial matters only, nor can Provincial Parliaments, upon pretence of dealing with local matters specially within its jurisdiction, really legislate upon matters assigned to Dominion legislation. Nor can the Dominion Parliament legislate upon Provincial matters by enacting them for the whole Dominion, nor can a Provincial Parliament deal with a Dominion matter by limiting the enactment to its own Province. The character of a law is not affected by any incidental effect it may have upon other matters. The Dominion Parliament can, in matters within its sphere, impose duties upon any subject whether officials of Provincial Courts or otherwise, or upon existing Provincial Courts. In all matters not exclusively assigned to Provincial legislation, such legislation, if conflicting with Dominion legislation, must yield to it. But Provincial Legislatures may legislate in aid of Dominion legislation. The Dominion Parliament can alone incorporate companies with power to do business throughout the Dominion, but only subject to Provincial law. Provincial Legislatures have no powers beyond those given by B. N. A. Act.

Each of the propositions laid down is discussed and supported in the light of decided cases and of the judgments and dicta of the courts, and we may here say that the author has done his work excellently well. The book gives the reader and the student a comprehensive, intelligent and most admirable epitome of the existing law upon all constitutional questions which have arisen, and is a guide as to questions which may arise under the construction of

British North America Act, or of the proper distribu-
of power between the Dominion and Provincial
islatures.

In the chapter upon the distribution of legislative powers
ween the Parliament of Canada and the Provincial Legis-
ures, which is one of the most important and interesting
n a constitutional point of view, the writer finds an oppor-
ity of contrasting our constitution with that of the United
tes. In order to avoid what seemed to be the weak point
the latter the framers of the B.N.A. Act exactly reversed
source of power. In the union of the United States of
erica the concession of power came from below, and the
eral States, or the people at large, were supreme in every
tter not specially given to the central authority. In the
.A. Act the power comes from above, and the central
hority, viz: the Dominion Parliament, retains all power not
cially assigned to the Provinces, and within the limits of
Act, exhausts the whole range of legislative power. In
United States there is a residuum of power not given
er to Congress or to the State Legislatures, and which can
y be exercised by the people through amendments to their
stitution. In Canada the whole legislative power being in
hands of Parliament that power can be wielded by the
ple directly through their representatives. In other words,
h us the people are not only trusted with power, but are
sted with the power of using it.

In the question of dealing with vested interests and
vate rights there is also an important difference between
constitution and that of the United States. In the latter
courts have gone so far in preserving the inviolability of
tracts and vested rights as to override most necessary
islation, and to protect corporations in exactions con-
ry to the general interest of the public at large. Hence the
tem of "government by injunction" of which we hear so
ny complaints. Under our constitution the interest of the
lic is, or ought to be, supreme, and if private rights,
ted interests or contracts interfere with public interests.
rliament has full power to control them. This power may, of

course, be abused, but the abuse in our case has not arisen. In the other it has attained very alarming proportions.

In laying down the works above referred to we do so with very satisfactory ideas as to the working of the Constitution of 1867.

W. E. O'BRIEN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

CRIMINAL LAW — MALICIOUS INJURY TO PROPERTY — TRESPASS ON GRASS FIELD — MALICIOUS INJURIES TO PROPERTY ACT, 1861 (24 & 25 VICT., C. 97), S. 52—(CR. CODE, 511).

In *Gayford* v. *Chouler* (1898) 1 Q.B. 316, a case was stated by a magistrate. The defendant walked across a grass field of the respondent, after notice to desist, and injured the grass to the extent of 6d., and it was held by Day and Lawrance, JJ., that this constituted a malicious injury to property, for which the appellant could properly be convicted; see Cr. Code, s. 511.

SOLICITOR—MISCONDUCT—EVIDENCE—APPLICATION TO STRIKE OFF THE ROLLS —ORDER OF COLONIAL COURT.

In re a Solicitor (1898) 1 Q.B. 331. This was an application made by the Incorporated Law Society to strike a solicitor off the rolls, on the ground that the solicitor in question had been a solicitor of a Colonial Court, and had been struck off the rolls of the Colonial Court for misconduct. The only evidence produced of the alleged misconduct was an affidavit that the Colonial Court had made an order striking him off the rolls for professional misconduct. The solicitor, although notified, did not appear, but the Court (Wright and Darling, JJ.) considered that the evidence of the alleged misconduct was insufficient to warrant the granting of the order asked.

RACTICE—JOINDER OF DEFENDANTS—JOINT AND SEPARATE CAUSES OF ACTION AGAINST DEFENDANTS, JOINDER OF—ORD. XVI., R. 5; ORD. XVIII., R R. 1, 8—(ONT. RULES, 186, 187, 232-7).

Gower v. *Couldridge* (1898) 1 Q.B. 349, is the converse of ıe case of *Smurthwaite* v. *Hannay* (1894) A.C. 494, and brings p the question whether it is open under the Rules for a laintiff to join joint and separate claims against defendants ı the same action. In this case the plaintiff sued several efendants for damages for a tort alleged to have been ommitted by them, and also for damages for a separate ort committed by some of them. Following *Sadler* v. *The reat Western Railway* (1896) A.C. 450, the Court of Appeal Chitty and Collins, L.JJ.) held that this could not be done. Although the amendment effected in the former Rule 300, y the present Con. Rule 185, may have the effect of enab- ng several plaintiffs having separate rights of action arising ut of the same transaction or occurrence to join in one ction; yet no corresponding amendment having been made ı Rule 186, it would seem that this case would govern its onstruction.

RINCIPAL AND AGENT—BROKER — INDEMNITY — STOCK EXCHANGE — WRONGFUL SALE BY BROKER—PURCHASE FOR DELIVERY AT A FUTURE DAY.

Ellis v. *Pond* (1898) 1 Q.B. 426, is a somewhat complicated ase, but the facts appear to be as follows: The plaintiff, as a roker for the defendant, was authorized to purchase shares n the stock exchange for delivery on Nov. 26. In pursuance f this contract, he contracted for the purchase of two blocks f shares, one of £105,000 and another of £45,000. By subse- uent agreement with the defendant it was arranged that the 105,000 lot should be taken up and paid for before the 26th ov., and this was done partly with plaintiff's own money, nd partly with a sum received by him from the defendant. earing a loss, and the defendant being unable to advance a ım necessary to cover possible loss, the plaintiff, without e defendant's consent, on the 19th Nov. sold off the whole t of stock, both that which he had paid for and that which e had contracted to buy, and realized therefor less per share nan could have been obtained had the sale been postponed

until the 26th Nov. The transaction having resulted in a loss, the action was brought for indemnity against such loss, and was tried by Mathew, J., with a jury, and the jury found that the sale on the 19th was wrongful, and that more could have been realized had it been postponed until the 26th. On this finding, Mathew, J., gave judgment for the plaintiff for the amount of the loss sustained on the whole transaction, less the difference between the amount actually realized and what the jury found would have been realized had the sale taken place on 26th Nov. But the majority of the Court of Appeal (Smith and Collins, L.JJ.) held that the plaintiff was entitled to no indemnity in respect of the £45,000, because as to that lot there had been no performance of the contract for purchase of the shares as between the plaintiff and defendant, and no default on the part of the defendant to take up and pay for these shares on the 26th Nov., they having been sold by the plaintiff without authority seven days before. Rigby, L.J., however, dissented and was of opinion that the defendant was also liable for the difference between the amount at which the £45,000 lot had been purchased and the amount realized therefor, notwithstanding the premature sale thereof by the plaintiff.

PROBATE—SEVERAL WILLS—REVOCATION—WILL MADE IN EXECUTION OF LIMITED POWER OF APPOINTMENT.

Cadell v. *Wilcocks* (1898) P. 21 was a probate action in which difficulties arose owing to the testatrix having executed three wills. She had been left by her father a sum of £4,000 for her life, with power of appointment thereof by will among her children. By the first will, made in 1890, she left one of her daughters "the sum of £4,000, being the sum left to me by the will of my father," and also disposed of her residuary estate; by a second will, made in 1894, she left the same daughter £4,000, and the residue of her property to the same daughter and one of her sons; and by the third will, in 1895, she left all her property to the same daughter. It will thus be seen that neither the second nor third will were sufficient to effect a valid execution of the power. The President, Sir

F. H. Jeune, thought the case governed by the principle stated in Williams on executors, 9th ed., p. 138, and approved by Lord Penzance in *Lemage* v. *Goodban*, 1 P. & D. 57, viz.——that the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter will expressly or in effect revoke the former, or the two be incapable of standing together; and if the subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then the latter instrument will revoke the former as to those parts only where they are inconsistent. He therefore held that the third revoked the second will, but neither had totally revoked the first, and he therefore admitted the first and third to probate. Notwithstanding some conflict of authority the learned judge expresses the opinion that if there had been any general words of revocation in either the second or third will, they would have effectually revoked the first will altogether, including the execution of the power contained in it.

PROBATE—Presumption of death—Practice—Affidavit of applicant.

In the goods of Hurlston (1898) P. 27. Barnes, J. here held that where, on an application for probate, the applicant seeks to rely on a presumption of death of the testator, who has disappeared, his affidavit should contain a statement of belief that the death occurred at the alleged date.

INSURANCE — Construction of policy—Peril of "fire and all other losses and misfortunes"—Ejusdem generis.

The "Knight of St. Michael" (1898) P. 30, was a special case stated by the parties for the construction of a policy of marine insurance on freight, which covered losses by fire and "all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the subject matter of the insurance or any part thereof." The vessel was loaded with coals, and before it had completed its voyage the coals became overheated, and to avoid the risk of spontaneous combustion and loss of the ship and cargo by fire, on the recommendation of surveyors, the larger portion of the cargo was discharged and sold, entailing a consequent loss of

freight. Barnes, J., held that the loss thus occasioned was *ejusdem generis* with the perils of fire specifically insured against, and that the insurers were consequently liable to make good the loss of freight.

LUNATIC — FOREIGN CURATOR — TRANSFER OF ENGLISH STOCKS TO FOREIGN CURATOR, WHEN ORDERED.

In re Knight (1898) 1 Ch. 257. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.), determined that, notwithstanding a statute which provides that where any stock is vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, on proof that such person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof according to the law of the place where he is residing, may order such stock to be transferred into the name of the person so appointed as the judge thinks fit. The Court has still a discretion to exercise in ordering stock under such circumstances to be transferred to the foreign curator of a lunatic, and that it should be satisfied, before such order is made, that such transfer is necessary for the maintenance of the lunatic, or that for some other sufficient reason the transfer is necessary.

COMPANY—DEBENTURE—PROSPECTUS—PROVISION FOR REDEMPTION—SINKING FUND.

In re Chicago & N. W. Granaries Co. (1898) 1 Ch. 263, was an action brought by debenture holders of a limited company to enforce an alleged stipulation providing for the redemption of the debentures within a period of seventeen years. The debentures provided that the company should carry to the credit of a sinking fund in each year £2,500, which should be applied in redeeming at a specific premium on January 1 and July 1 in each year, so many of the debentures issued as the sum at the credit of the sinking fund should suffice to pay off, the debentures so to be redeemed to be determined by lot. The prospectus previously issued, however, on which the plaintiffs also relied, which invited subscriptions for the debentures, stated that they were to be redeemable in seven-

teen years by half yearly drawings on January 1 and July 1 in each year by the application of a sinking fund of £5,000 per annum. The company had carried out the terms of the debentures and had applied £2,500 only to the sinking fund, and had from time to time redeemed debentures to the amount of the sinking fund, but the plaintiffs claimed that the whole of the debentures were, under the prospectus, redeemable in seventeen years, and that in order to effect their redemption within that period it was necessary for the company to appropriate to the sinking fund, in addition to the £2,500 per annum, the interest which would have been earned by the debentures redeemed; but North, J., was of opinion that the debentures alone could be looked at as constituting the contract between the parties, and that the stipulation therein contained as to redemption was in effect a mere notice that the debentures were liable to be redeemed as therein provided, but not to a contract to redeem all the debentures within the seventeen years.

SOLICITOR—COSTS—SOLICITORS' ACT, 1874 (37 & 38 VICT., C. 68), S. 12 (1)—PRACTICING WITHOUT A CERTIFICATE—(R.S.O. C. 174, SS. 2, 19, 22-24).

In re Sweeting (1898), 1 Ch. 268. North, J., here holds that under the English Solicitors' Act, 1874, s. 12 (1), a solicitor cannot tax fees for business done by him while practising without his annual certificate. It is doubtful whether this would be an authority under the Ontario Act (R.S.O. c. 174). That Act (s. 2) prevents a person from recovering costs for business done as a solicitor without being "admitted and enrolled," but ss. 19, 22-24 which impose penalties for practising without an annual certificate, do not expressly provide that fees for business done by a solicitor practising without a certificate shall not be recoverable. A liability to pay a penalty to the Law Society and to be suspended from practice seem to be the only penalties imposed by the Act, and in the absence of an express prohibition forbidding his recovering his fees there seems to be nothing to prevent their recovery.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] WASHINGTON *v.* GRAND TRUNK RY. CO. [Dec. 9, 1897.

Railways—Construction of statute—51 Vict., c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 Vict., c. 29 (D.)) does not apply to the fillings referred to in the third sub-section and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed. Appeal allowed with costs.

Staunton, for appellant. *McCarthy*, Q.C., for respondents.

Ontario.] HAGGERT *v.* BRAMPTON. [Dec. 9, 1897.

Mortgage—Trade fixtures—Chattels—Tools and machinery of a "going concern"—Constructive annexation—Mortgagor and mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed, but in a manner appropriate to their use, and showing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty. Appeal dismissed without costs.

Aylesworth, Q.C., and *Justin*, for appellant. *Blain* and *D. O. Cameron*, for respondents.

Quebec.] COWANS *v.* MARSHALL. [Dec. 9, 1897.

Negligence—Master and servant—Common fault—Jury trial—Assignment of facts—Arts. 353 and 314 C.C.P.—Art. 427 C.P.Q.—Inconsistent findings—Misdirection—New trial—Pleading.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts

sufficient to show the breach of a duty owed him by the defendant and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned, and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the explosion, a verdict for the plaintiff cannot be sustained, and a new trial should be granted. Appeal allowed with costs. New trial granted without costs.

Lajoie, for appellants. *Trenholme*, Q.C. and *Ryan*, for respondent.

Quebec.] GLENGOIL STEAMSHIP CO. *v.* PILKINGTON. [Dec. 9, 1897.

Maritime law—Affreightment—Carriers—Charter party—Privity of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts. 1674, 1675, 1676 C.C.—Contract against liability for fault of servants—Arts. 2383 (8); 2390; 2409; 2413; 2424; 2427 C.C.

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master of liability upon contracts of affreightment during such voyage where exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damage caused through improper or insufficient stowage.

A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling, or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

Appeal dismissed without costs.

Atwater, Q.C., and *Duclos* for appellants. *Macmaster*, Q.C. (*Farquhar Maclennan* with him) for the respondents.

Province of Ontario.

COURT OF APPEAL.

[March 10.

BIRELY *v.* TORONTO, HAMILTON & BUFFALO R.W. CO.

Railways—Expropriation—Award—Appeal—51 Vict., c. 29, s. 161 (D.).

Under s. 161 of Dominion Railway Act, 51 Vict., c. 29 (D.), an appeal lies in this Province by either party from an award of compensation exceeding $400, either to the Court of Appeal or to the High Court of Justice, but if an appeal is taken to the latter tribunal no further appeal lies by either party to the Court of Appeal.

Aylesworth, Q.C., for plaintiffs. *D'Arcy Tate*, for defendants.

From Armour, C.J.] WEBSTER *v.* CHICKMORE. [March 15.

Assignments and preferences—Pressure.

Where a preferential security is attacked within sixty days, pressure is of no avail to rebut the presumption of invalidity. Judgment of ARMOUR, C.J., reversed. BURTON, C.J.O., dissenting.

Ryckman and *C. W. Kerr* for appellant. *Clarke*, Q.C., for respondents.

From MacMahon, J.] YELLAND *v.* YELLAND. [March 15.

Benefit society—Certificate—Change in rules.

A certificate issued by a benefit society providing for payment to the member's "next of kin," is not affected by a subsequent change of the rules of the society omitting "next of kin" by that name, from the classes of persons to whom certificates may be made payable. Judgment of MACMAHON, J., affirmed.

Watson, Q.C., and *Moore*, for appellants. *Poussette*, Q.C., for respondents.

From Court of Revision.] [March 15.

IN RE TORONTO RAILWAY COMPANY ASSESSMENT.

Assessment—Street Railway—Rails, poles and wires—Highways.

The rails, poles and wires, of the Toronto Railway Company, used by them in operating their electric railway and laid and erected in and upon the public highways of the city of Toronto are subject to assessment under the Consolidated Assessment Act, 1892, 55 Vict., c. 48 (O). BURTON, C.J.O., dissenting.

Fleming v. *Toronto Street R. W. Co.*, 37 U.C.R. 116, has been overruled by *Consumers Gas Co.* v. *Toronto*, 27 S.C.R. 453.

Robinson, Q.C., and *Fullerton*, Q.C., for city of Toronto. *McCarthy*, Q.C., and *Laidlaw*, Q.C., for Toronto Railway Company.

From Street, J.] FISHER *v.* FISHER. [March 15.

Life insurance—Construction of policy—Designation of beneficiary—R.S.O. (1887), c. 136.

An application for life insurance stated that the insurance money was to be paid to the applicant's wife, and the policy as issued provided that the insurance money should, upon the death of the assured, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing endorsed on the policy, and in default of any such designation to his legal personal representatives.

Held, OSLER, J.A., dissenting, that the policy came within the Act to secure to wives and children the benefit of life assurance, R.S.O. (1887), c. 136, and was not affected by an absolute assignment, endorsed upon it, by the assured to a creditor. Judgment of STREET, J., 28 O.R., 459, reversed.

McCarthy, Q.C., and *W. J. McWhinney*, for appellant. *Aylesworth*, Q.C., for respondent.

From Ferguson, J.] ST. DENNIS *v.* SCHULTZ. [March 15.

Malicious prosecution—Reasonable and probable cause—Advice of counsel.

That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence. Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury. Judgment of FERGUSON, J., reversed.

M. K. Cowan, for appellant. *W. H. P. Clement*, for respondent.

From Armour, C.J.] [March 14.

LONG *v.* ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benefit society—"Renewed contract"—55 Vict., c. 39, s. 33 (O.).

It is not a renewal of a contract of insurance within the meaning of 55 Vict., c. 39, s. 33 (O.), but a revival of the original contract, when after default in payment of assessments and consequent suspension of rights, a member of a benefit society pays the assessments, and, pursuant to the rules of the society, becomes ipso facto re-instated. Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *Totten*, Q.C., for appellants. *Staunton* for respondent.

From Armour, C. J.] HILL *v.* BROADBENT. [March 15.

Deed—Description—Appurtenances—R.S.O. (1877), c. 102, s. 4.

The general words in the Short Forms of Conveyances Act, R.S.O. (1877), c. 102, s. 4, will not pass lands and buildings not embraced in the specific description, merely because the lands and buildings have been held, used, occupied and enjoyed with the property specifically described by metes and bounds. Judgment of ARMOUR, C.J., affirmed.

Riddell, for appellant. *Staunton* and *Lazier* for respondent.

From Falconbridge, J.] SMITH *v.* ONDERDONK. [March 15.

Hire of chattels—Contract—Sub-contract—Defect—Damages.

A contractor for the excavation of a railway tunnel, who, pursuant to the terms of a sub-contract, supplies to a sub-contractor a locomotive for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a defect in the locomotive, that defect being a patent one, and the sub-contractor having accepted the defective locomotive without objection. Judgment of FALCONBRIDGE, J, reversed.

Crerar, Q.C., and *D. W. Saunders*, for appellants. *W. Nesbitt*, for respondent.

TATE *v.* NATURAL GAS AND OIL CO. [April 1.

Parties—Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

A motion by the defendants and the Ontario Natural Gas Company for leave to appeal from the order of a Divisional Court, ante 194, allowing the plaintiff to add the latter company and an individual as parties defendant, was refused, the court agreeing with the opinion of MEREDITH, C.J., in the Divisional Court.

W. R. Riddell for the applicants. *Aylesworth*, Q.C., for the plaintiff.

HIGH COURT OF JUSTICE.

Divisional Court.] HENDERSON *v.* TOWNSHIP OF YARMOUTH. [Dec. 10, 1897.

Municipal corporations—Tiles placed on side of highway—Accident—Negligence.

On the side of a township road, there was a fill of about fourteen feet, with railings on either side, and for the purpose of repairing a culvert, which ran through the fill, a quantity of tiles, of a large size, and of a light gray colour, were piled on the side of the highway in a slight hollow behind the railing, having some planks thrown over them, and a board nailed between the two boards forming the railing, so as to further hide the tiles from view.

Held, that this did not constitute evidence of negligence on the defendants' part so as to render them liable for injuries sustained by the plaintiff by reason of the horse which he was driving becoming frightened at the tiles and running away.

J. A. Robinson, for plaintiff. *Glenn*, for defendants.

Divisional Court.] BEATTY *v.* HOLMES. [Feb. 10.

Division Court—Jurisdiction—Insolvent—Sale of quantity of goods and distribution of, amongst certain creditors—Recovery in Division Court by assignee in insolvency.

Where within sixty days of the making of an assignment for the benefit of creditors the insolvent transferred to a person in trust for certain of his

reditors a quantity of butter, which was sold, realizing $1,800, and the proceeds distributed amongst such creditors in proportion to their claims, whereby hey acquired a preference, the Division Court has jurisdiction to entertain an action brought therein by the assignee for the benefit of creditors, to recover he amount received by one of such creditors, being his share of such proceeds, and which was in itself of an amount within the competence of such court.

Aylesworth, Q.C., for plaintiff. *D. L. McCarthy* for defendant.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 10.

FARQUHARSON *v.* IMPERIAL OIL CO.

Riparian owners—Soil of stream—Dams—R.S.O. 1887, c. 120, s. 1—"Other obstruction."

The owner of the soil on both sides of a running stream, whether navigable or not, is prima facie the owner of the soil which forms the bed of the stream; and the owner of the soil on each side is in the same manner owner of the soil of the bed up to the centre of the stream, and dams constructed by such owners or with their consent over their parts of the stream are not wrongfully erected.

The words "any other obstruction" above stated do not comprehend the erection of dams, but only other obstructions of a like kind with felling trees.

Aylesworth, Q.C., and *A. E. Shaunessey* for appeal. *Osler*, Q.C., contra.

Meredith, C.J., Rose, J., MacMahon, J.] [Feb. 14.

SMITH *v.* HAYES.

Machinery—Injury by, of child—Allurement to child—Knowledge of defendant—Trespass—Evidence.

Plaintiff, a child of five years of age, was injured by a horse-power used by defendant to hoist grain into his warehouse. The machine was on a lot nfenced on one side, leased by him, adjoining his warehouse, about thirty feet rom the highway.

Held, that as the evidence did not show that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, or any knowledge in the defendant that children were in the habit of frequenting the place, or any intention on his part to injure; and as the plaintiff had no right to be where he received the injury, he could not recover. *Finlay* v. *Miscampbell* (1890), 20 O.R. 29, followed, and judgment of Meredith, J., sustained.

Aylesworth, Q.C., for motion. *J. B. Jackson*, contra.

Divisional Court.] REGINA *v.* FITZGERALD. [Feb. 14.

Conviction—Order nisi to quash—Death of prosecutor after—Effect of.

Where, after an order nisi had been obtained to quash a conviction, but before service thereof, the prosecutor died, but service had been effected on the magistrates, the court held that, notwithstanding such death, they might deal with the matter, and they made the order absolute, quashing the conviction.

Douglas Armour for applicant. No one contra.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 17.

SMITH *v.* SMITH.

Parent and child—Farm agreement—Maintenance of parents—Consideration—Definite contract—Evidence—Change of parent's intention.

When a child seeks to enforce an agreement that if he remains with a parent, and works the farm and provides for his declining years, the parent will bestow the farm on him, courts will require that the agreement be established by the clearest evidence, and a certain and definite contract for a valuable consideration proved, or the parent will be entitled to change his views and the disposition of the property, in case of his own altered circumstances or want of filial conduct on the part of the child. Judgment of ROSE, J., reversed.

G. W. Wells, Q.C., for appeal. *Riddell* and *W. E. Kelly*, contra.

Divisional Court.] SAUNDERS *v.* CITY OF TORONTO. [March 1.

Municipal corporations—Carters employed to remove street sweepings—Master and servant—Negligence—Liability.

In an action brought against a city for injuries sustained by the plaintiff by being run down, while riding a bicycle along one of the streets, by a licensed carter employed in removing to a dumping ground street sweepings which were placed in piles on the side of the street. He owned the horse and cart he was driving, but was hired by the department having charge of this work, and received his orders from their foreman, which were, where to get the stuff and where to dump it, and to go and return by the shortest route, and for failure to carry out his orders he was subject to dismissal. He worked all day, consisting of nine hours, and was paid 28 cents per hour. He had been occasionally hired in the spring and fall of the year, when this work required to be done, and had been at work off and on during this particular season, and for two weeks constantly prior to the accident happening. A city by-law was proved which provided that the committee which had charge of this work might provide such scavenger carts as they might deem necessary, each cart to be supplied with one horse and the necessary appurtenances, and controlled by one man, the man and cart to be under the charge of the officers of the department whose duty it was to see to the cleaning of the lanes and streets.

Held, that the relationship of master and servant existed between the city and the carter at the time the accident occurred, and a non-suit entered at the trial was set aside and a new trial directed.

Gash, for the plaintiff. *Fullerton*, Q.C., for defendants.

Meredith, C.J.] MAGANN *v.* FERGUSON. [March 8.

Assignment for creditors—Liquidated claim—Double value of land—4 Geo. II., c. 28, s. 1—Right to rent.

Damages against an overholding tenant under 4 Geo. II., c. 28, s. 1, at the rate of double the yearly value of the land, do not constitute a liquidated

claim, and the landlord cannot rank on an estate in the hands of an assignee for creditors in respect to them, even after he has recovered judgment therefor.

Grant v. *West* (1896), 23 A.R. 533, followed.

A. C. Macdonell for the plaintiff. *W. W. Rowell* for the defendant.

MacMahon, J.] ROBERTS *v.* COUGHLIN. [March 23.

Security for costs—Infant plaintiff out of jurisdiction—Next friend.

An infant, residing out of the jurisdiction, brought an action for administration, by her mother, who resided in the jurisdiction, but was without substance, as next friend.

Held, that the plaintiff could not be required to furnish security for costs.

Magee, Q.C., for plaintiff. *Woods*, Q.C., for defendants.

Street, J.] CAMPBELL *v.* FARLEY. [March 25.

Parties—Claim against partnership—Administratrix of deceased partner—Concurrent administration proceedings—Action against surviving partner—Indemnity—Relief over—Third party procedure.

At law, as well as in equity, before the Judicature Act, a partnership debt was, in strictness, joint and not several, and upon the death of one partner the only liability existing at law was that of the surviving partner; the estate of the deceased partner being only made available through the equities existing in favour of the surviving partner, which the partnership creditors were allowed to make use of; and the Act has not converted into a joint and several debt that which had theretofore been merely joint. *Kendall* v. *Hamilton*, 4 App. Cas. 504, and *In re Hodgson*, 31 Ch. D. 177, followed.

In an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner.

Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over and in respect of the plaintiffs' claim, must be made in the administration proceedings and not in the action under the third party procedure.

Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her as a security to him against his liability to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party.

J. H. Moss for plaintiffs. *Tremeear* for defendant Farley. *W. E. Middleton* for defendant MacDonald.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] JORDAN *v.* MCDONALD. [March 8.

Constable—Arrest under warrant not indorsed for service out of jurisdiction—Evidence—Vindictive damages—Error in instructions to jury—Crim. Code, ss. 25, 242, 552.

Plaintiff claimed damages for an alleged unlawful assault by defendant with the assistance of others in the city of Halifax, and his arrest and detention in jail. The defence was that plaintiff had been guilty of the offence of assaulting, cutting and wounding one P., a policeman of the town of W., while in the discharge of his duty, and that the assault and imprisonment complained of were committed in arresting plaintiff under a warrant issued by the stipendiary magistrate of the town of W. for his apprehension to answer such charge. At the time of the arrest the warrant had not been endorsed by any magistrate having jurisdiction in the county of Halifax so as to enable an arrest to be made under it in such county. The jury having returned a verdict in plaintiff's favor for $250 damages, defendant applied for a new trial.

The Criminal Code, s. 25, provides that "If any offence for which the offender may be arrested without warrant has been committed, anyone who, on reasonable and probable grounds, believes that any person is guilty of that offence, is justified in arresting him without warrant, whether such person is guilty or not."

Held, 1. The words "may be" in this section refer to the provisions of the code which authorize arrest without warrant, including s. 242, under which a person not a peace officer is enabled to arrest without warrant a person who, on reasonable grounds, he believes is guilty of the offence of unlawfully wounding, where such offence has in fact been committed, s. 242 being one of the "following sections" referred to in s. 552.

2. Defendant in making the arrest in the county of Halifax, under a warrant not endorsed for execution in that county, could not be regarded as a peace officer, and therefore was a person within the meaning of s. 242.

3. It was open to defendant to contend that the arrest was made outside of and independent of the warrant, and to show that at the time the arrest was made he was aware that plaintiff had committed the offence of unlawfully wounding.

4. If defendant could not justify under the warrant by reason of the absence of the necessary endorsement, but the circumstances were such as to justify him in making the arrest without a warrant, he had "good authority" for so doing.

Evidence was tendered to show that plaintiff had to the knowledge of defendant been guilty of the offence of unlawfully wounding P., a constable of the town of W., while in the discharge of his duty, and that he had been for sometime evading arrest, and that there was reason to fear that if he was not arrested at the time he was he would escape.

Held, 1. The trial judge erred in excluding this evidence from the consideration of the jury.

2. He erred in failing to instruct the jury not to give vindictive damages unless they were of the opinion that defendant was influenced by ill-will or malice, or had acted in bad faith, or was guilty of some oppression or misconduct towards plaintiff in connection with the arrest.

3. If defendant thought he was acting as an officer at the time he made the arrest and had reasonable grounds for entertaining that view, and was entitled to protection to the same extent as if he were an officer.

4. Evidence of the assault committed by plaintiff, which was a necessary element of defendant's case was improperly excluded.

Motion for new trial allowed with costs.

W. E. Roscoe, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

Full Court.] STRONG *v.* BENT. [March 8.

Statute of frauds—Verbal contract of hiring not to be performed within year—Substituted contract not covered by statement of claim—Parol evidence to supplement letter—New trial.

In Sept., 1896, plaintiff and defendant entered into a verbal agreement for the hiring of plaintiff by defendant for a year, the period of hiring to commence at a future date not then determined. Plaintiff commenced working for defendant on the 2nd or 3rd Nov. following, and was dismissed in the month of May, 1897, on the ground that he had done business in other goods and for other firms, contrary to his agreement with defendant. On the trial evidence was given to show that after the hiring in November a reorganization of the defendant firm took place, and that a new agreement was made under which plaintiff performed services for defendant, for which he was entitled to recover.

Held, reversing the judgment of the County Court judge with costs, that plaintiff could not recover either on the original contract, for non-compliance with the statute of frauds, it not being a contract to be performed within a year, or upon the substituted contract of which evidence was given, as he had not declared upon such a contract in his statement of claim or given defendant notice that he intended to set up such a claim. And that a letter from defendant, which was relied upon as taking the case out of the statute, could not be supplemented by parol evidence.

Per MEAGHER, J.—The statement of claim was sufficient to cover a claim for a yearly hiring under the alleged substituted agreement, and that the case should be sent back for a new trial, on this point, to determine whether in point of fact such agreement had been made.

H. W. C. Boak for appellant. *H. Mellish* for respondent.

Full Court.] BANQUE D'HOCHELAGA *v.* MARITIME RY. NEWS CO. [March 8.

Partner—Costs of appeal taken by co-partners—O. 40, R. 10.—Execution.

The defendants, B., D. and C., did business as co-partners under the name and style of the Maritime Railway News Co. In an action at the suit of

plaintiff, C. and D. were served, and appeared and defended the action, but B., who was not known at the time to be a member of the firm, was not served, and swore that he did not know, until after the termination of the proceedings, of the nature of the action, or of the steps taken by his co-partners to defend it. Judgment having been given for plaintiff, C. and D. appealed. The appeal was dismissed with costs. After the costs connected with the trial and appeal had been incurred plaintiff discovered that B. was a member of the firm, and took steps under O. 40, R. 10, to have execution against him on the judgment recovered against the firm, and also the costs incurred in connection with the appeal and not included in that judgment. The application was heard before Graham, E.J., who made the order applied for. From this the defendant B. appealed.

Held, dismissing the appeal, that B. was liable not only for the costs of the original action and judgment, but for the costs of the appeal taken by his co-partners C. and D., and that his only remedy was against his co-partners in winding-up the partnership.

C. H. Cahan for plaintiff. *W. B. A. Ritchie*, Q.C. for defendant.

Full Court.] BARROWMAN *v.* FADER. [March 8.

Sale of land—Covenant to pay taxes—Demand before action—Provision of Halifax city charter as to time at which taxes become due—Act allowing a discount if paid promptly.

Plaintiff and defendants entered into an agreement for the sale by plaintiff to defendants of a lot of land for a sum of money payable in instalments extending over a period of four years. The agreement contained a clause providing that until the completion of the purchase defendants should have the possession of the land and should be entitled to receive all the rents and profits, and should pay all rates and taxes of every kind levied or assessed on the land. Ten days after the making of the agreement an assessment was made for taxes which became due and payable on the 1st May following, and for which plaintiff became liable to be sued by the city of Halifax, and to have his property levied upon by warrant for the recovery of the taxes at any time after the 31st May, prior to which time the taxes constituted a lien on the property.

Held, 1. The situation so far as regarded plaintiff's rights and liabilities, was the same as if the covenant to be performed on the part of defendants had reference to a mortgage to mature on the 31st May, and that plaintiff was entitled to recover.

2. Payment of the rates and taxes by defendants formed part of the consideration for the contract whereby they were permitted to enter into possession and to receive the rents and profits.

3. As there was an absolute covenant on the part of the defendants to pay, plaintiff was not required to make a demand before bringing his action.

By the Acts of 1897, c. 44, s. 22, the city collector was authorized to allow a discount of two per cent. to all persons paying their taxes on or before the 31st day of July of the year in which such taxes fell due.

Held, that this did not affect the provisions of the city charter (Acts of 1891, c. 58, s. 362) under which all rates and taxes become due the 31st day of May in each year, or postpone the time of payment.

A. Whitman, for appellant. *C. P. Fullerton*, for respondent.

Full Court.] MCINTYRE *v.* MCKINNON. [March 8.

Deed — Description — Construction, "In front of"—Evidence — Control.

Trespass to land. Defendants replied upon deed from L. of a lot of land, approximately triangular in shape, being parcel of a larger lot of land conveyed to L. by V. J. S. and wife, and described as being "on the south shore of Gabarus Bay, in the county of Cape Breton, and bounded as follows: that is to say, by a line beginning at the shore at a stake . . . and thence running south . . . to a general rear line, etc." The front line of the triangular lot was a road running across L.'s land near the shore; one of the side lines was uniform with one of the side lines of the land conveyed to L., while the third or remaining line ran obliquely across it. The deed relied upon by the defendants, in addition to the land included within the three sides of the triangle and conveyed by the deed, contained the words "together with the land in front of the said lot to high water mark."

Held, that the words "in front of" were to be read in their ordinary sense, and the front line of the triangle being of the length of 176 feet, the land "in front" and intended to be conveyed, would necessarily be of the same width, and not of the width that would result from extending the oblique line of the triangle to high water mark.

The trial judge admitted in evidence an agreement made between the defendant M. and one S., and also evidence of acts done upon the ground by M. and S. in pursuance of the agreement, which evidence was introduced for the purpose of controlling in favour of M. the description in the deed from L.

Held, that none of the evidence so received was admissible, the transactions relied upon having taken place about two years prior to the date of the deed from V. J. S. to L.

J. A. Chisholm for appellant. *H. Mellish* for respondent.

Townshend, J., at Chambers.] [March 18.

IN RE KINNEAR TRUSTS, JONES *v.* SMYTHE.

Trust estate—Income during infancy—Disposal of estate on cêstui que trust attaining full age.

K., on 2nd January, 1879, made a trust deed of certain securities "upon trust to collect, get in and receive the interest and dividends, and to pay the same to his wife B. K. for her own use until the younger of his two children, B. E. K. and T. C. K., should attain the age of twenty-one years; and upon such attaining, upon trust to hold the said assigned securities to and for the sole and absolute use and benefit of the said B. E. K. and T. C. K. equally, share and share alike, and of the survivor of them, in case of the death of either of them, free from the control, debts or liabilities of any husband or

husbands of them or either of them. And likewise to pay over to them or the survivor free from such control, debts and liabilities as aforesaid, all the aforesaid interest and dividends equally, or in case of death, all to the survivor. Provided, in the event of the said B. E. K. and T. C. K. dying, leaving children, then, and in such case upon trust, to transfer and assign the said securities unto such children or child, as the case may be, in such manner that such children or child shall and may stand in the place of, and receive the share, proportion and interest of and in the premises of his, her or their respective deceased parent, or of the survivor, as the case may be." T. C. K. died in February, 1892, and E. K. died in September, 1882. T. C. K. was younger than B. E. K.; B. E. K. was 21 in 1896, and married H. H. S. After making the trust deed the settlor died, having made a will.

Held, that the income during infancy of B. E. S. went to the executrix of E. K.: *Laxton* v. *Eedle*, 19 Beav. 321; and that on B. E. S. attaining age of 21 years she became entitled to the corpus absolutely: *Home* v. *Pillans*, 2 M. & K. 15, *Clarke* v. *Henry*, L. R. 11 Eq. 221, 6 Ch. 588: *In re Dowling's trusts*, 14 Eq. 463.

W. B. A. Ritchie, Q.C., for trustees. *C. S. Harrington*, Q.C., for residuary legatees under will. *R. E. Harris*, Q.C., *C. H. Cahan* and *H. McInnes*, for B. E. S. *H. B. Stairs*, representing unborn children of B. E. S.

Townshend, J., in Chambers.] IN RE SCOTNEY. [March 19.

Will—Construction of—Condition precedent—Vested legacy.

Testator died in 1890; by his will he directed his executors to convert estate into money and hold it invested during lifetime of testator's wife, and at her death to divide same equally amongst certain named of his children, of whom Frederick was one, and one S. S., his grandson. Then followed a provision as follows: "The legacy to my son Frederick is upon condition that he transfers to my executors the property which I conveyed to him in 1870," and "the legacy to my grandson S. S. is upon the condition that he lives to the age of twenty-five years, and if he be not of that age at the death of my wife, my executors shall retain his share until he arrives at such age and then pay the same over to him. . . . That in the event of the condition annexed to the devise to my son Frederick and my grandson S. S. not being fulfilled or performed, I direct my executors to divide the share or shares of those in default amongst the other named devisees."

Frederick, in 1891, was requested by the executors to make the conveyance, but neglected to do so. He died unmarried and intestate in Jan., 1897. Testator's widow died in Nov., 1897. The grandson S. S., though alive, reached the age of twenty-three only. After the death of Frederick, at request of the executors, the heirs of Frederick Scotney conveyed his lands to the executors.

Held, that the legacy to Frederick was made upon a condition precedent which he was bound to perform, and the gift over to the other devisees took effect as he did not do so, and the conveyance after his death did not fulfil the condition to enable the parties to take as heirs at law.

Held, also, that the legacy to S. S. was not a vested one, and should he e before he reached twenty-five years of age the devisees over and not his tate would be entitled.

Cases discussed—*In re Hodges' Legacy*, 16 Eq. 92; *Davis* v. *Angel*, 4 e G. F. & J. 524; *Simpson* v. *Vickers*, 14 Vesey 341; *Davis* v. *Thomas* Russ. & N. 506.

W. B. A. Ritchie, Q.C., for executors. *H. McInnes* for creditors of rederick Scotney. *W. R. M. Hauten* for legatee S. S. *J. F. Frame* for evisees over.

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ull Court.] BARROWMAN *v.* FADER. [May 8.

Taxation of costs—Notice—Time for giving—O. 63, R. 13.

Under O. 63, R. 13, before taxing costs, the party taxing is required to ive one day's notice to the opposite party. Under O. 63, R. 13, before taxing osts accruing in Halifax, "one day's notice . . . shall be given by the olicitor of the party whose costs are to be taxed to the other party or his olicitor, etc."

Held, that the words "one day" are not to be read as meaning "one lear day," and

Semble, that notice given at any time up to seven o'clock of the evening of ne day before the day for which the notice is given would be sufficient

A. Whitman for plaintiff. *C. P. Fullerton* for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] DAY *v.* RUTLEDGE. [March 11.

Tax sales—Mortgagor and mortgagee—Mortgogor's wife cannot cut out mortgage by buying at the tax sale—Assignee of tax purchaser acquires no better title than assignor.

The defendant and his wife (to bar her dower) executed a mortgage of his arm to plaintiff to secure $3,000. In May, 1893, the farm was sold for arrears f taxes amounting to $48, and purchased by Mrs. Rutledge in her own name, nd the tax sale certificate was handed to her. In the summer of the same ear in response to a letter from Mrs. Rutledge, a brother of the plaintiff came om Ontario to see the Rutledges about it, and stayed about two weeks at heir house. At this time a new mortgage was executed by Rutledge and his ife (to bar her dower as before) in favor of the plaintiff, as a substitute for the ormer one, but no mention was made to the plaintiff's brother of the tax sale vhich had been made; and the judge found as a fact that Rutledge and his ife had formed a scheme to defraud the plaintiff and get title to the farm free om the mortgage. In December of the same year the tax sale certificate vas assigned to a person who had advanced the money to enable Mrs. Rut-

ledge to make the purchase. This person in May, 1895, assigned the certificate to the defendant Lawlor for $75, and a few days afterwards a tax sale deed of the land was issued by the municipality to Lawlor. The Rutledges continued to live on the property up to the time of the action. It was shown that Rutledge was present when the negotiations for the sale of the certificate to Lawlor took place, and Lawlor leased the property to a cousin of O. G. Rutledge, an unmarried young man, who lived with him.

This action was brought for the foreclosure of the mortgage and to have it declared that Lawlor holds the land in trust for the mortgagor. The mortgage contained the usual covenants by the mortgagor for payment of the mortgage money and taxes and performance of statute labor.

Held, following numerous decisions in the courts of the United States, that the mortgagor, who has a duty to pay taxes, cannot, after neglecting such duty, purchase at a tax sale and acquire a valid title which would defeat the claim of the mortgagee.

Held, also, following Blackwell on Tax Title, 572, and *Warner* v. *Broquet*, 39 Pac. R. 922, that a wife cannot obtain a valid tax title to her husband s real estate by the purchase thereof at a tax sale, if she is under any obligation, legal or moral, to pay the taxes, and that in the circumstances appearing in the case Mrs. Rutledge was under at least a moral obligation to pay the taxes, and had been guilty of fraudulent concealment of the fact of her purchase when the plaintiff's brother was at her house; and that the facts showed that she had taken part in a fraudulent scheme to defeat and cut out the plaintiff's mortgage.

Held, also, that, although there was no evidence to show that he had purchased the certificate to assist the Rutledges in defeating the plaintiff's mortgage, the assignee Lawlor could claim no better or higher rights under the tax sale than the original purchaser had acquired. Blackwell on Tax Title, 633, and *Manning* v. *Bonnard*, 54 N.W.R. 439, followed. Lawlor knew that there was a mortgage on the land when it had been purchased at the tax sale by the wife of the mortgagor, and he must have known from the presence of Rutledge when he made his bargain for the certificate that Rutledge, or his wife, or both, were still interested in the land.

Delaration that Lawlor holds the land in trust for Rutledge and his wife and the usual foreclosure decree made with costs. Lawlor to have a lien for the full amount of the tax sale purchase money and any sums subsequently paid by him for taxes with interest.

Culver, Q.C., and *Mulock*, Q.C., for plaintiff. *Ewart*, Q.C., and *Wilson* for defendants.

Taylor, C.J.] PHILLIPPS *v.* PROUT. [March 11.

Mortgagor and mortgagee — Accounts in the Master's office — Subsequent incumbrancer—Bonus or special commission on mortgage loan, when allowed.

This was an appeal by a subsequent incumbrancer from the report of the Master on taking of the account of the plaintiff's claim under a mortgage given by the defendant.

Held, 1. Where the party brought into the Master's office under notice provided for by Rule 117, Queen's Bench Act, 1895, takes no steps to have the decree varied or set aside, he cannot afterwards object to the plaintiff's right to a decree of foreclosure.

2. Where the plaintiff has served a party with such notice to come in and prove his claim as a subsequent incumbrancer, he cannot afterwards raise an objection that the party so served has no lien on the land.

3. A mortgagee in bringing his accounts into the Master's office should charge himself with the net proceeds only of any rents or profits received by him out of the mortgaged premises, leaving the incumbrancer to surcharge if he considers the mortgagor entitled to a larger credit.

4. Where, in the negotiations for a loan to be secured by mortgage, the mortgagee stipulates for a bonus or special commission or other charge in consideration of advancing the money, in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterwards paid and settled: *Potter* v. *Edwards*, 26 L.J. Ch. 468; *Mainland* v. *Upjohn*, 41 Ch. D. 126. But otherwise such bonus or special advantage cannot be recovered or allowed in equity: *James* v. *Kerr*, 40 Ch. D. 524; *Eyre* v. *Wynn-McKenzie* (1894), 1 Ch. 218, and *Field* v. Hopkins, 44 Ch. D. 524.

5. Where the mortgagee in his account has charged himself with the gross proceeds of crops raised on the mortgaged premises, he is entitled to deduct from that the expenses of raising and marketing.

Howell, Q. C., and *D. A. Macdonald* for plaintiff. *Culver*, Q.C., for the incumbrancer.

Dubuc, J.] CASE *v.* BARTLETT. [March 11.

Registry Act, R.S.M., c. 135, s. 68—Judgment, registration of—Priority of unregistered instrument—Judgments Act, R.S.M., c. 80, s. 5.

Section 68 of the Registry Act, R.S.M., c. 135, provides that priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument to the party claiming under the prior registration; and section 5 of the Judgments Act, R.S.M., c. 80, enacts that a certificate of judgment duly registered shall bind all interest or estate of the defendant in land situated within the district, the same as though the defendant had in writing under his hand and seal charged the land with the amount of the judgment.

Held, that notwithstanding these provisions a registered judgment creditor cannot claim priority over the grantee of an unregistered conveyance previously executed and delivered by the judgment debtor. *Wickham* v. *The New Brunswick Ry. Co.* L.R. 1 P.C. 64; *Whitworth* v. *Gaugain*, 3 Hare 415; *Eyre* v. *MacDowell*, 9 H.L. 618, followed. *Miller* v. *Duggan*, 21 S.C.R. 47, and *Stark* v. *Stevenson*, 7 M.R. 381, distinguished. *McMaster* v. *Phipps*, 5 Gr. 253, not followed.

Mulock, Q C., for plaintiff. *Howell*, Q.C., and *Mathers* for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] MACHIN *v.* PIERCY. [March.

Partition—Dower.

A judgment of partition of certain farming lands forming part of an intestate's estate having been made, a question arose upon settling the minutes as to whether the widow was entitled to dower in the coal supposed to lie under the partitioned lands.

On the authority of *Stoughton* v. *Leigh*, 11 Rev. R. 817, in which it was decided that though a widow is dowable of mines opened during her husband's lifetime, and in which he had an estate of inheritance during coverture, she is not dowable of unopened mines.

Held, that the widow had no right to dower in any unopened deposits of coal which might lie under the partitioned lands.

Drake and Irving, JJ.] PARKS *v.* PITTENDRIGH.

Mandamus—Small Debts Court—Interpretation of statute.

Appeal from the decision of MCCOLL, J., refusing an application for mandamus to defendant to issue execution upon a judgment which was rendered by a judge of the Supreme Court on an appeal from the Small Debts Court over which defendant Pittendrigh presided. The grounds for the application were that inasmuch as the Small Debts Act did not provide any practice for such a case, but did provide that "when anything necessary for carrying out the scope or any provision of this Act is omitted herein, the remedies, practice and procedure of the 'County Court's Act' and rules may be applied," and the rules under that Act, provided that in cases of appeal from the County Court, the judgment of the Supreme Court could be filed in the County Court and thereupon should be enforced in that court, the same procedure should be applicable for the Small Debts Court. The appeal by the provisions of the Small Debts Act lay to "a judge of the Supreme Court or to the nearest County Court," and the succeeding section provided that "on every such appeal the court to which the same is taken shall try and determine the question in dispute." The judgment was entitled "In the Supreme Court of British Columbia."

Held, that the appeal from the Small Debts Court was to the Supreme Court of British Columbia, and the judgment being in that court could be enforced according to the rules thereof, and therefore a mandamus would not lie to the stipendiary magistrate to proceed in the Small Debts Court.

Brydone-Jack, for the appellant.

Walkem, Drake, Irving, JJ.]

CANADIAN PACIFIC RAILWAY *v.* MCBRYAN.

Natural user of water—Overflow—Damage.

In this case the defendant relied upon his right to use his land in the natural course of user, unless in so doing he interfered with some right

created by law or contract. The plaintiffs claimed to have a right to enjoy their land free from invasion of filth or other matter coming from any artificial structure on land adjoining. The defendant put up on his own land an artificial erection, and by means thereof communicated upon his own land a quantity of water much larger than could or would have been collected if he had used his land in the natural way. He then raised his artificial structure some feet higher, and this subsequent raising caused damage to the plaintiffs. The plaintiffs showed that their own land was damaged, and claimed that the defendant was using his land in an unnatural way.

Held, that the defendant by erecting this dam for the purpose of accumulating water in the way he did was making an unusual or extraordinary use of his land and of the water. Having so collected this body of water by this extraordinary user, and having injuriously affected the plaintiffs' property, the defendant violated that rule of law which will not permit anyone, even on his own land, to do an act lawful in itself, which being done in that place, necessarily does damage to another. But for the defendant's act in accumulating water no mischief would have accrued, and he is liable for the resulting damage.

Davis, Q.C., for plaintiff. *Wilson*, Q.C., for defendant.

Walkem, J.] B. C. CANNING CO. *v.* CHU LAI. [March 19.

Practice—Arbitration—Commission to take evidence.

This was an action commenced by a writ of summons issued out of the Supreme Court, and the parties afterwards agreed to submit the matters in dispute to arbitration, and an arbitrator was appointed. After the evidence was all in, except that of one witness in California, the arbitration was adjourned in order that the plaintiffs might produce the witness before the arbitrator. The plaintiffs now applied for leave to issue a commission for the examination of the witness in California.

Held, that as the questions in dispute had been submitted to arbitration the court had no jurisdiction to make the order asked for. Summons dismissed with costs.

Moresby, for plaintiffs. *Luxton*, for defendants.

Walkem, J.] ALDOUS *v.* HALL MINES. [March 23.

Mineral Acts—Adverse claim—Affidavit verifying.

This action was tried in Nelson. In 1894 the plaintiff's husband located the mineral land in dispute in her name and as her agent; he also took out a mining license for her and has kept it renewed ever since. As her agent he now brings this adverse claim on an affidavit of verification made by himself. The affidavit was objected to, on the ground that it should have been made by the plaintiff herself.

Held, that according to sec. 14 of the Mineral Act of 1892, as amended by sec. 10 of the Mineral Act of 1893, an affidavit made by any person other than the one making the adverse claim is insufficient.

Section 2326 of the Revised Statutes of the United States and amendment of 26th April, 1882 compared. Claim dismissed with costs.

Wilson, Q.C., for plaintiff. *E. P. Davis*, Q.C., for defendants.

Book Reviews.

The Law of Legislative Power in Canada, by A. H. F. LEFROY, M.A., Oxon., of the Inner Temple, London, and Osgoode Hall, Toronto, barrister-at-law. Toronto: Toronto Law Book and Publishing Co., Ltd., 1898.

We refer to this valuable addition to our library in our editorial columns. We notice in the *Law Quarterly* a very complimentary review of Mr. Lefroy's book by Mr. A. V. Dicey, Q.C., than whom there is no higher authority on such a subject. We might notice in passing that Mr. Dicey questions the desirability of expending labour upon what is practically an annotated code, which is noteworthy in view of the fact that most of his works are built upon that principle.

The Law of Evidence, SIDNEY L. PHIPSON, M.A., of the Inner Temple barrister-at-law. London, Stevens & Haynes, Law Publishers, Temple Bar, 1898.

This is the second edition of Mr. Phipson's very excellent work. This book does not seem to be as well known in this country as it deserves, and we can safely say it improves on acquaintance. Mr. Phipson has a uniform method of arrangement, stating (1) the rules of evidence, (2) the principles upon which they are founded, (3) their various limitations, and (4) the illustrations to these rules, the illustrations being given in a more condensed type than the rest of the matter. The aim has been to present an exhaustive statement of the law of evidence in a relatively moderate compass—a most praiseworthy object, well carried out. The arrangement to this end is exceedingly good and the illustrations apt and accurate. It makes an excellent circuit companion. This edition increases by one-third the text and number of cases cited in the first edition, and the chapter on extrinsic evidence has been amplified and remodelled.

Powell's Principles and Practice of the Law of Evidence, by JOHN CUTLER, B.A., Q.C., and CHARLES F. CAGNEY, B.A., Middle Temple, barrister-at-law. London, Butterworth & Company, 7 Fleet St., Law Publishers, 1898.

This is now the seventh edition of this excellent and standard work. It is so well known and so highly thought of that it is unnecessary to enlarge upon it. The book before us, together with Mr. Phipson's work on Evidence, above alluded to, take a middle place between Sir James Stephens' Digest and the elaborate and bulky volumes of Taylor on Evidence. Over 160 new cases are cited in this edition, and the law has been brought down so as to cover all statutes and cases reported up to September 30th, 1897.

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The attitude of the American Congress prior to the recent outbreak of hostilities seems to have been precisely the reverse of that which the framers of the constitution expected it to adopt. The danger apprehended by those far-sighted politicians and jurists was that, if the power of declaring war were given to the President, he might involve the nation in a contest against its wishes. They, accordingly, curtailed in this respect the functions usually possessed by the executive department of the Government, and provided that it should rest with the Legislature to say whether the emergency was one which called for the *ultima ratio regum*, their theory being, as Chancellor Kent observes (I Comm. p. 52), that "nothing short of a strong case deeply affecting essential rights, and which could not receive a pacific adjustment, after all reasonable efforts should have been exhausted, would ever prevail upon Congress to declare war." The President and Congress, however, may be said, during the last few weeks, to have exchanged the roles which they were to play, and the world has been treated to the curious spectacle of a Legislature which was intended to act as a drag upon the executive, slighting the temperate counsels of Mr. McKinley and rushing precipitately into a war which a large proportion of the citizens regard as wholly unjustifiable, or at least unnecessary, under the circumstances, and which might possibly have been avoided, and the desired result attained, by the "pacific adjustment" of cool-headed diplomacy. Whether the President in the now famous message, in which, after explaining the situation in Cuba and the different courses which might be pursued, left to Congress the responsibility of deciding between them, discharged his functions precisely in the manner originally contemplated by those who defined them, is an interesting question which we

shall not attempt to discuss. We cannot help thinking, however, that a document which appears to have been framed upon the model of a charge delivered to a jury by an extremely cautious judge who is anxious to avoid any very decided expression of opinion, was scarcely the kind of address which the gravity of the crisis demanded. However this may be we most heartily sympathize with those citizens of the great republic, who, disregarding their material interests, are honestly desirous (unfortunately there are many clamourers who are not honest) of righting the wrongs inflicted upon an oppressed and misgoverned people by a nation which still lives in the darkness, superstition and cruelty of the Middle Ages.

By the recent decision in *Pedigo* v. *Commonwealth*, the Kentucky Court of Appeal may be said to have given a new meaning to the adage which tells us that "every dog has his day," etc., and indeed to have raised one species of our faithful canine friends to a position of wholly unprecedented dignity. A majority of the judges have held that the mere fact of a bloodhound's having taken up the trail of the defendant at the scene of a crime and followed it to his residence, is admissible in evidence against him, although as there was nothing else to show that he had actually been at the spot, and, for aught that appeared the scent might have travelled a considerable distance before it struck the animal's sense of smell. The "bloodhound witness case," as it is now commonly termed, has naturally excited a good deal of attention in the United States. That the instincts of dogs may often furnish valuable testimony under appropriate circumstances is not to be denied, and the same remark may be made with reference to their sense of smell. But it is rather startling to find a decision even by a divided court to the effect that the liberty of a citizen may be jeopardized by information procured in the manner described in this case. The only redeeming feature of the majority opinion is that it restricts the use of such evidence within very narrow limits, and requires so many conditions precedent to be satisfied that if

he lines laid down are closely adhered to by trial judges, the number of instances in which any harm would ensue would be very small. One judge dissented, and his reasoning is, to our mind, quite unanswerable. His opinion is too long to quote. but any of our readers who take an interest in the eccentricities of jurisprudence will find it set out at length in the *Albany Law Journal* of Feb. 26, 1898 (p. 139). Can it possibly be that the learned judges who constituted the majority of the court had been reading that sensational, and, t is to be feared, somewhat imaginary account of the tracking of the hero of Mr. Hall Caine's "Christian?" Even so, seems as though they had "bettered the instruction."

ASSOCIATION OF THE BAR OF NEW YORK.

It is interesting to note the provision made in English speaking countries, other than our own, for the use, convenience and comfort of the legal profession. We had the pleasure recently of learning something of the Association of the Bar of the City of New York, on which occasion its privileges were most courteously extended to the writer.

This association is in fact a club. It is not open to the profession at large, but is only for those who are elected as members, and whose character and reputation are fully vouched for, after the personal scrutiny of the committee. Although only organized in 1870, it has a membership of over 1,500, composed of the most desirable professional men in the city, and up to this date it has a library consisting of some 54,000 volumes. Our library at Osgoode Hall gives us the use of about 35,000 volumes. It contains complete sets of English, American and Canadian Reports, and an almost perfect set of the statutes of these countries. It was interesting to be told that of this large library some 16,000 volumes have from time to time been presented by various members of the association; a brilliant testimony to their munificence and liberality. These gifts include many rare books and interesting pamphlets, many of them being nowhere else obtainable.

This library is said to be the most complete law library in existence in the various branches of English and American jurisprudence.

The new home of the association, No. 42 West 44th st., is a building which is architecturally admirable, and most commodious and perfect in all its details. Whilst we do not feel equal to the task of adequately describing its beauty and completeness, it needs no technical skill to discern that in every part there has not only been lavish expenditure, but the best taste displayed.

On entering, one's attention is at once called to the magnificent appearance of the entrance hall, with its beautiful marble pillars, wainscoting and staircases, On either side of this hall are reception rooms, containing writing tables, magazines, newspapers, current law reviews and books of general literature, as well as committee rooms, office, cloak room, etc. An elevator takes you to the second floor, where there are large club rooms where the members meet for conference or conversation, and a large hall for the more formal gatherings. These various rooms are decorated and furnished in perfect taste, rich, but severe in style, as becomes the solemnity of the law. The third floor contains what is called the "stack room," for old tomes and books in less frequent use, with ample space for additions. There are also smaller rooms for consultation and other purposes. "But where," we asked, "is the library?" The acceptance of a courteous request to again enter the elevator answered the question. The fourth story is devoted to it. Here, away from interruption and the noises of a busy city, is the workroom of this beautiful building. It is to this room we would specially direct attention for the manifold conveniences connected with it. It is certainly a most attractive place, with its high ceiling, with central clere-story, supported by pillars, its large and open fireplace at each end of the room, its various alcoves where are the many books in general use. Numberless comfortable seats, with desks adjacent, provide amply for the convenience of the members, having an electric light to each desk in the library. Electric bells summon boys, who bring

ks as they are needed, so that no time is lost or labour necessarily expended in hunting for them. All this, of rse, costs money, as well as careful supervision, but a fee $40 per annum from the older members and $20 from the nger, makes ample provision for all needs.

The beauty and convenience of the building is not greater n was the kind courtesy of a friend, one of the members, l of the House Committee, in according to the writer the nporary use of the library, "with its appurtenances and the privileges and advantages derivable therefrom or con-cted therewith." When we are rich enough at Osgoode ll (and the present economical rule will soon make it so, ess indeed the Legislature interferes to gobble up a foolish umulation) we shall, without thinking any the less of our n loved Alma Mater and the many beauties of our hall and court rooms, have many things to learn from the New York r Association, its munificent patrons, liberal-minded mem-rs, and its beautiful and commodious building.

EMPLOYER'S LIABILITY TO SERVANT.

E POSITION OF A SERVANT WHO CONTINUES WORK ON THE FAITH OF HIS MASTER'S PROMISE TO REMOVE A SPECIFIC CAUSE OF DANGER.

I.—Introductory.—The continuance of work by a servant o has learnt that he is exposed to an extraordinary nger arising from the defective condition of some trumentality used by the master obviously raises both e question whether he has elected to include the additional k among those which he is deemed to have accepted virtue of his contractual relations, and the question ether under the circumstances he is acting prudently in naining in a position where he will have to incur the new zard. If, therefore, he receives an injury owing to e existence of such a peril after it has become known to n, it is open to the master to rely either upon the defence assumption of risks or upon the defence of contributory gligence. It is manifest that the situation is not altered in

these broader aspects where the work is continued for the reason that the servant is assured by the master or by some agent authorized to speak for him, that steps will be taken to remedy the defective conditions to which the extraordinary danger is traceable. That the promise was made, and that the servant's conduct was influenced by it, are circumstances which merely introduce new factors into the investigation (*a*). The two defences will be available to the master whether he has undertaken to remove the cause of danger or not (*b*). Practically the sole result of the giving of the promise is to diminish the number of cases in which the court would be justified in pronouncing, as a matter of law, that one or other of those defences is open to the master (*c*).

In England the exposition of the law which was furnished in the well-known case of *Holmes* v. *Clark* (*d*) seems to have entirely satisfied the profession, for since the date of that decision no court of review has ever been invited to discuss the subject (*e*). In the United States, on the other hand, that case merely had the effect of opening the floodgates of litiga-

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(*a*) *Manufacturing Co.* v. *Morissey* (1883), 40 Ohio street, 148.

(*b*) If specific authority be needed for a proposition so simple, it will be sufficient to refer to *Holmes* v. *Clark* (1862), 7 H. & N. 937; (see more especially the opinion of Crompton, J., who stated that he founded his judgment on two propositions, viz., that there was no defence under the principle of law laid down in *Priestley* v. *Fowler* (1837), 3 M. & W. 1, and that the plaintiff had not contributed to his injury by his own negligence.)—See also *Lewis* v. *New York, &c., R. Co.* (1891), 153 Mass. 73; 10 L.R.A. 513; *Schlaker* v. *Mining Co.* (1891), 89 Mich. 253. Sometimes, it may be observed in passing, the ambiguity of the phrase "assumption of risks," which in common parlance covers negligent conduct, has produced an apparent confusion between the two defences: see, for example, *Roux* v. *Blodgett, &c., Co.* (1891), 85 Mich. 519. Those who wish to see how far this misuse of words has been carried in the judgments of American courts are referred to an article by the present writer in the American Law Review for September, 1897.

(*c*) The effect thus ascribed to a promise to remove a specific cause of danger is, it will be observed, analogous to that ascribed to a direct order, which, under appropriate circumstances, operates as an implied assurance that there is no *present* danger, and relieves the servant of the imputation of contributory negligence, except in cases in which no prudent man would have obeyed the order: *Patterson* v. *Pittsburgh, &c., R. Co.* (1874), 76 Pa. 389; *Chicago, &c., R. Co.* v. *Bayfield* (1877), 37 Mich. 204. Not infrequently the evidence shows a reliance by the servant on an assurance of present safety, as well as a promise to make such changes as will restore the defective instrumentality to its usual condition: *Flynn* v. *Kansas City, &c., R. Co.* (1883), 78 Mo. 195; *Sendzikowski* v. *McCormick Mach. Co.* (1895), 58 Ill. App. 418.

(*d*) (1862), 7 H. & N. 937.

(*e*) *Holmes* v. *Worthington*, 2 F. & F. 533, a nisi prius case tried pending the appeal in *Holmes* v. *Clark*, is of interest chiefly because it reports a charge to the jury by Willes, J., one of the judges who afterwards concurred in the decision in that case in the Exchequer Chamber. The question does not appear to have yet come under the consideration of any Canadian court whose decisions are reported.

ion, and the frequent adjudications on the subject to be found n the American reports evince the assiduity with which the urists of that country have devoted themselves to the solu- ion of the minor problems which are involved in the appli- ation of the general doctrine. That many of these problems re still regarded by them as open to debate is indicated in very striking manner by the fact that there was quite ecently an almost equal division of opinion in the Supreme Court of Illinois with regard to the phraseology which should e used by a trial judge in instructing the jury as to the ength of time during which the servant is entitled to remain t work after the giving of the promise, without being dis- bled from maintaining his action (*a*). But, on the whole, t may be said that the outcome of the prolonged discussion as been to produce a fairly stable and definite body of ules, and, as there is at least a possibility that cases of his type may be presented under the Canadian Employers' Liability Act, a review of the entire subject, in which he English decisions will be supplemented and illustrated y the vast mass of materials accumulated by our neigh- ors will perhaps be not unwelcome to the readers of this ournal. The limitations upon our space will prevent our lwelling much upon the specific facts involved in the cases, ut, as the authorities will all be cited, the inquirer will have ready means of access to all the learning there may be in he reports upon any particular point.

II.—Relation between the master and servant after a promise, generally.—The first question which demands an answer is—what is the true rationale of the contractual relations between the master and the servant after the former has promised to remove a danger which threatens the latter? Upon this point there is a considerable difference of judicial opinion. To us the most satisfactory theory seems to be that indicated by the remark which Byles, J., interjected during the argu- ment of counsel in the leading case of *Holmes* v. *Clark* (*b*),

(*a*) See *Illinois Steel Co.* v. *Mann* (1897), 43 N.E. 418. The substance of this case will be stated below. See sec. V, note (z)

(*b*) (1862), 7 H. & N. 937.

where the servant was injured by machinery, left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not the contract of the plaintiff: 'I will work with fenced machinery'; after it was broken, was not the contract: 'I will continue to work, if you will restore the fencing?'" This conception of a change in the implied terms of the contract does not, however, appear to have been very generally adopted (*a*).

Perhaps the most generally received view is that the inference which would normally be drawn, that the servant intended to assume the new risk, or was guilty of contributory negligence, in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a certain right of action which, apart from the promise, would be imputed to the servant as a consequence of his continuance of work, will not be implied where a promise has been given. Thus in the case just cited Cockburn, C.J., draws a distinction between "the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied," and lays it down that, "in the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation" (*b*).

(*a*) *In Greene* v. *Minneapolis, &c., R. Co.* (1884), 31 *Minn.* 248, the court favoured that reason for the rule which would place it on the ground of "a contract on the part of the employee that, if a servant continues in the service, in the meantime and until the defects are remedied, the employer and not the servant will assume the risks," but it is not easy to say from this statement whether it is referable to the idea of a substituted contract, or of the continuance of the original one. That the true rationale of the situation existing after the promise is that a new conditional contract comes into force is indicated very strongly by those cases in which the promise to remove a specific cause of danger is given *before* the servant undertakes his work: *Hyatt* v. *Hannibal, &c., R. Co.* (1885), 19 Mo. App. 287, [master liable for exposing servant to extreme cold, against which he has been assured that he will be protected]: *Cheeney* v. *Ocean S. Co.* (1893), 92 Ga. 726, [master liable for injuries resulting from his violation of a promise to station a man at the hatch of a ship in order to protect labourers in the hold while the loading is going on].

(*b*) Compare the statement of Mr. Cooley in his well-known work on Torts, p. 559, that "the assurances of the master that the danger will be removed remove all ground for argument that the servant by continuing to work engages to assume the risk," (quoted with approval in *Hough* v. *Railway Co.*, 100 U.S. 213). See also the language used in *Pieart* v. *Chicago, &c. R. Co.* (1891), 82 Iowa 148; *Texas, &c., R. Co.* v. *Bingle* (1894), 9 Tex. Civ. App. 322.

Another way of stating the legal situation is that the omise continues or revives the original liability of the aster (*a*), or what amounts to the same thing, operates as implied request to the servant to remain in the service, d an assumption of the risk in the meantime (*b*). This eory, however, is open to the objection pointed out by the preme Court of Texas (*c*), that, if the original contract is the hypothesis continued, it is difficult to offer any adeate reason for making a distinction between the effect of an press promise and the effect of the implied promise which at contract is presumed to include.

So far as the servant's rights of recovery are concerned, it clearly immaterial which of these theories is assumed to be e correct one. In the one case the suit is brought for the each of the original contract which, by the hypothesis, is pt alive by the promise, unaffected by the inferences which ould ordinarily be drawn from the fact that the servant has ne on working with a knowledge of the danger caused by e breach. In the other case the servant seeks to enforce ghts alleged to have been acquired by a substituted conact. Whichever view is adopted, therefore, the grounds on which the master will be able to resist the action must essentially alike, and the measure of damages the same. is aim will be to show that although the effect of the omise may have been to keep the original contract in force, to create a new one, the servant has remained so long in e employment that any virtue which the promise may have ssessed has been exhausted, the inference being that he s assumed the new risk as a matter of contract, or that, even suming that he has not lost his contractual rights, the nger to which the promise related was such that a prudent an would not have exposed himself to it at all, or at least ould not have exposed himself to it so long as the plaintiff s done. In practice it will be found that the rights

(*a*) *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123.

(*b*) *Galveston, &c., R. Co.* v. *Drew*, (1883), 59 Tex. 10; compare *Eureka Co.* v. *Bass* (1886), 81 Ala. ; *Schlitz* v. *Pabst Brewing Co.* (Minn. Supr. Ct. 1894); 59 N.W. 531.

(*c*) *Galveston, &c., R. Co.* v. *Brentford* (1891), 79 Tex. 619.

of the parties have almost invariably been settled by determining whether the latter of these defences is available. It is obviously a matter of extreme difficulty to fix, upon any satisfactory principle, the limits of a period after which the servant will be deemed to have accepted the new risk, while on the other hand, the circumstances involved in cases of this type are such as will naturally invite a consideration of the servant's conduct as suggesting the exercise or non-exercise of care on his part. The following sections, therefore, will necessarily take the shape of a review of the conclusions at which the courts have arrived in dealing with the effect of a promise from this standpoint.

III.—When the Defence of Contributory Negligence is open to the Master.—The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review, will be found to depend upon two considerations, viz., whether the election to take the risk was prudent, and, if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger (*a*). These two points are manifestly quite distinct, though they are sometimes not distinguished as clearly as they should be by the courts (*b*). The latter, however, has no direct connection with the promise, and nearly involves a special application of the general principle that everyone is bound to use that degree of care which the circumstances require (*c*). Confining our attention, therefore, to the former point, we find that the courts are unanimous as regards the doctrine that, "if under all the circumstances, and in view of a promise to remedy the defect, the servant was not wanting in due care in continuing to use the defective appliance, the master will not be excused for its failure to supply proper instrumentalities, upon the ground of contributory negligence" (*d*). In

(*a*) *Counsell* v. *Hall* (1887), 145 Mass. 468.

(*b*) See, for example, *Corcoran* v. *Milwaukee Gas Light Co.* (1892), 81 Wis. 191, where the court seems to waver betwen a theory which would deprive the servant of a right to recover on the ground of negligence in continuing to work, and the theory that he did not take appropriate precautions in view of the dangers of the situation.

(*c*) See the case just cited, and *Meador* v. *Lake Shore, &c., R. Co.* (1894), 138 Ind. 290.

(*d*) *Hough* v. *Railway Co.*, 100 U.S. 213.

other words, the servant's continuance of work with knowledge of a danger will not be pronounced negligence, as a matter of law, where the continuance was induced by a promise of the master to remove the cause of that danger (*a*). The theory is that, in view of the giving of the promise, the servant's knowledge and appreciation of the risk is to be regarded, not as a fact which conclusively charges him with negligence, but simply as a fact which may be considered with others as bearing upon that point (*b*). To preclude the servant, therefore, from maintaining an action where he has been assured that a defect will be remedied, it must be shown that his voluntary exposure to danger was for, some special reason, imprudent under the circumstances. Was he, in other words, justified in believing that by exercising an appropriate degree of care he could avoid an accident until the promise was fulfilled? (*c*).

An answer to this question may be arrived at by considering both the elements which, in a given case, indicate what may be termed the aggregate amount of the danger to which the servant has exposed himself by continuing work, viz.: the imminence and greatness of the peril, and the length of time during which the exposure to it has continued. On the one hand, the more serious the peril, the more rapidly will the permissible period of continuance run out. In some instances, indeed, the peril may be of such a kind that nothing can excuse the servant for continuing to expose himself to it a moment after he knows it to exist (*d*). On the other hand,

(*a*) *Holmes* v. *Clark* (1862), 7 H. & N. 937: *Laning* v. *New York, &c., C. Co.* (1872) 49 N.Y. 521; *Soux* v. *Blodgett, &c., Co.* (1891), 85 Mich. 519; *Lyttle* v. *Chicago, &c., C. Co.* (1890), 84 Mich. 289; *Northern, &c., C. Co.* v. *Babcock* (1893), 154 U.S. 190; *Kane* v. *Northern Centr. R. Co.* (1888), 128 U.S. 91; *New Jersey, &c., C. Co.* v. *Young* (1892), 49 Fed. 725; *Union Mfg. Co.* v. *Morissey* (1883), 40 Ohio St. 148; 48 Am. Rep. 669; *Wust* v. *Erie City Iron Works*, (1892), 149 Pa. St. 263; *Gulf &c., R. Co.* v. *Donnelly* (1888), 70 Tex. 371; *St. Clair Nail Co.* v. *Smith* (1890), 43 *Ill. App.* 105; *Missouri Furnace Co.* v. *Abend* (1883), 107 Ill. 44; 47 Am. Rep. 425; *Fairbank* v. *Haentzsche* (1874), 73 Ill. 236; *McKelvey* v. *Chesapeake, &c., R. Co.* (1891), 35 W. Va., 500; *Gibson* v. *Minneapolis, &c., R. Co.* (1893), 55 Minn. 177; *Greene* v. *Minneapolis, &c., C. Co.* (1884), 31 Min. 248; *Lyberg* v. *Northern P. R. Co.* (1885), 39 Minn. 15.

(*b*) *Holmes* v. *Clarke* (1862), 7 H. & N. 937.

(*c*) *Conroy* v. *Vulcan Iron Works*, 6 Mo. App. 102; *Sioux City, &c., R. Co.* v. *Finlayson* (1884), 16 Neb. 578; 49 Am. Rep. 724, are cases in which the fact that the servant believed that he might go on working safely if he exercised care was emphasized.

(*d*) That cases in which the use of dangerous explosives found to be defective is involved would fall into this category is, perhaps, a reasonable inference from the language used in *Eureka Co.* v. *Bass* (1886), 81 Ala. 200; *Davis* v. *Graham* (1892), 2 Colo. App. 210.

the fact that some accident will sooner or later occur as a result of exposure to an even moderate peril, when it is constantly incurred for a considerable period, justifies the argument that, the longer the time that has elapsed without a fulfilment of the promise to remedy a defect, the more certainly has the servant been guilty of negligence in continuing in the employment.

IV.—The extent of the danger incurred—the servants' culpability tested by.—It is obvious that the doctrine which makes the servants' right of recovery dependent upon the extent of the danger may be stated in two forms. We may say that the mere giving of a promise will not of itself suspend the operation of the principle that a servant cannot recover for an injury of which his own negligence was an efficient cause, and that he will, therefore, be unable to maintain an action wherever the danger to which he was exposed after receiving the promise is such that no man of ordinary prudence would have run the hazard of remaining in the employment (*a*). Or we may say that the giving of the promise will entitle the servant to recover for any injury received within a reasonable time after the promise was given, unless the danger which the master agreed to remove was so great that no prudent man would have exposed himself to it. This is the form which the rule most naturally takes in cases in which the servant's action is held to be maintainable (*b*).

(*a*) *Holmes* v. *Clarke* (1861), 7 H. & N. 937; *District of Columbia* v. *McElligott* (1885), 117 U.S. 621; *Kane* v. *Northern R. Co.* (1888), 128 U.S. 91; *Indianapolis, &c.*, v. *Watson* (1887), 114 Ind. 20; *Railway Co.* v. *Kelton* (1892), 55 Ark. 933; *Texas, &c., R. Co.* v. *Bingle* (1895), 9 Tex. Civ. App. 322 (1895); *McAndrews* v. *Montana U. R. Co.* (1894), 15 Mont. 290. An instruction is erroneous which in effect declares as a conclusion of law, that, if the master promised repairs, he is liable without regard to the character of the defects, or the probability or improbability of danger, or whether, all things considered, the plaintiff was or was not so negligent in continuing to work that he ought not to recover: *McKelvey* v. *Chesapeake, &c., R. Co.* (1891), 35 W. Va. 500. Compare *Counsell* v. *Hall* (1888), 145 Mass. 468; *Gulf, &c. R. Co.* v. *Brentford* (1891), 79 Tex. 619; *International &c. R. Co.* v. *Williams* (1891), 82 Tex. 342

(*b*) *Brownfield* v. *Hughes* (1889), 128 Pa. 194; *Patterson* v. *Pittsburg, &c., C. Co.* (1874), 76 Pa. 389; *Conroy* v. *Vulcan I. Works* (1876), 62 Mo. 35; *Rothenberger* v. *Northwestern, etc., Co.* (Minn. Supr. Ct., 1894), 59 N. W. 531; *Greene* v. *Minneapolis, &c., R. Co.* (1884), 31 Minn. 249; *Harris* v. *Hewitt* (Minn. Supr. Ct., 1896), 65 N.W. 1085; *Smith* v. *Backus L. Co.* (Minn. Supr. Ct., 1896) 67 N.W. 358; *Homestake Min. Co.* v *Fullerton* (1895), 69 Fed. 23 (C.C. A.); *Atchison, &c., C. Co.* v. *Midgett* (Kan. App. 1895), 40 Pac. 995. A finding, in answer to a special interrogatory, that the danger of using a defective appliance was great, apparent, and continuous, will not overcome the effect of a general verdict for the plaintiff, where there is no finding that an ordinarily prudent man would not have used it under the circumstances: *Indianapolis, &c., R. Co.* v. *Ott.* (Kan. App. 1893), 38 N. E. 842; 39 N. E. 52 .

Usually, of course, it is a question of fact for the jury whether the defect was such that only an imprudent man would have continued to use the defective appliance (*a*). But sometimes a court will undertake to declare, as a matter of law, that the continuance of work was negligence, as where the servant drove a vicious horse with an old and rotten harness, although the employer had promised to fix the harness or give him a new one—especially where a new harness had been furnished which the servant might have used (*b*).

In determining whether or not due care has been observed in a given case, the giving of the promise, and the natural effect which that circumstance woald produce upon the mind of a man of ordinary prudence, are to be taken into consideration (*c*). It has been very truly remarked that, relying upon the promises of a master to remove the cause of danger, "the most prudent workmen will often take risks, not merely on account of their own necessities, but in consideration of their employers whose interests require their continued service" (*d*).

V.—The length of the period during which the work was continued—the servants' culpability tested by.—It is well settled that, except in cases where there is an imminent danger of injury (*e*), or, in other words, that, in every case where the servant has good grounds for believing that he may safely remain in the service (*f*), he is entitled to continue at work for a reasonable time after the promise is received without being held guilty of contributory negligence (*g*). What is a reasonable time under the circumstances must,

(*a*) *Hough* v. *Railway Co.* (1879), 100 U.S. 213; *Holmes* v. *Clarke* (1862), 7 H. & N. 937 *Smith* v. *Backus L. Co.* (Minn. Supt. Ct., 1896), 67 N.W. 358; *Schlitz* v. *Pabst Brewing Co.* (Minn. Sup. Ct., 1894), 59 N.W. 188.

(*b*) *Levesque* v. *Janson* (1895), 165 Mass. 16.

(*c*) *Texas, &c., R. Co.* v. *Bingle* (1895), 9 Tex. Civ. App. 322.

(*d*) *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148.

(*e*) *Atchison, &c., R. Co.* v. *Midgett* (Kan. App. 1895), 40 Pac. 995; *Greene* v. *Minneapolis, &c., Po* (1884), 31 Minn. 249.

(*f*) *Conroy* v. *Vulcan I. Works* (1878), 62 Mo. 35; 6 Mo. App. 102.

(*g*) *Lyttle* v. *Chicago, &c., R. Co.* (1890), 84 Mich. 289; *Woodward I. Co.* v. *Jones* (1885), 80 la. 123; *Ferriss* v. *Berlin Mach. Works* (1895), 90 Wis. 541; *Breckenridge Co.* v. *Hicks* (Ky. Ct. of App; 893), 22 S.W. 554. *In Stephenson* v. *Duncan*, 73 Wis. 404, the complaint was held fatally defective or the reason that it averred that the defendant had ample time to put the appliance in safe condition between the time when the plaintiff informed him of the defect and the time of the injury. This llegation was held to imply that the plaintiff continued in his employment beyond the time within which he might reasonably expect the defendant would keep his promise and remedy the defect.

it is evident, ordinarily be a question for the jury (*a*). But doubtless the master would properly be held liable, as a matter of law, for an injury occurring within any specific period covered by the promise, provided the danger was not so great that the servant was bound, as a prudent man, to quit the service immediately after ascertaining the existence of that danger (*b*).

Some authorities interpret the phrase "reasonable time" as meaning such a time as would reasonably be allowed for the performance of the promise (*c*), or the time which may elapse "while the servant is reasonably expecting the promise to be performed" (*d*). Others amplify this statement by declaring that the servant can recover for an injury caused by the defect "within such a time after the promise as would be reasonably allowed for the performance, or within any period which would not preclude all reasonable expectation that the promise might be kept" (*e*). Others, again, have undertaken to impart greater definiteness to the rather vague expression, "reasonable time," by enunciating the doctrine that, as "a promise already broken can afford no reasonable guaranty of the fulfilment of any expectation based on its disappointed assur-

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(*a*) *Joliet, &c., R. Co.* v. *Velie* (Ill. 1892), 26 N.E. 1086; *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148; *Smith* v. *Backus L. Co.* (Minn. Sup. Ct., 1894), 67 N.W. 358; *Belair* v. *Chicago, &c., R Co.* (1876), 43 Iowa 662; *Ferriss* v. *Berlin Mach. Works* (1895), 90 Wis. 541. The question of reasonableness cannot be determined from the lapse of time alone, but depends upon the circumstances—the frequency with which the servant was called upon to handle the defective appliance after the promise was received, the opportunities he may have had to examine it, and the necessity for making that examination, in view of his complaint as to its condition, and the right he had to suppose it had been repaired in pursuance of the promise: *Belair* v. *Chicago, &c., R. Co.* (1876), 43 Iowa 662, where the court refused to say, as a matter of law, that a brakeman waived his objection to a defective draw-bar by continuing in the service for about three months, during which time he had occasional opportunities for ascertaining whether the master's promise had been kept.

(*b*) *Greene* v. *Minneapolis, &c., R. Co.*, (1884), 31 Minn. 249.

(*c*) *Rothenberger* v. *Northwestern Milling Co.* (Minn. Sup. Ct. 1894), 59 N.W. 53; *Parody* v. *Chicago, etc., R. Co.* (1882), 15 Fed. 205.

(*d*) *Counsell* v. *Hall* (1888), 145 Mass. 468.

(*e*) *Shearman & Redf. Negl.* sec. 96, quoted with approval in *Hough* v. *Railway Co.* (1879), 100 U.S. 213. In a very recent Illinois case, already referred to, (*Illinois Steel Co.* v. *Mann* (1897), 43 N.E. 418), four members of the court were of opinion that the servant is justified in remaining in the service only for such time as is reasonably sufficient to enable the master to remove the defect, while the other three held that a reasonable time is the time during which the servant is authorized in the exercise of reason and prudence to rely upon the promise. The view of the dissentient minority appears to be more in harmony with the general principles which determine the servant's rights under these circumstances, and is substantially the same as that adopted in the decision in the cases cited above.

ces," the servant is not in the exercise of due care if he mains in the service after the period fixed for the comple- n of the repairs has come to an end without the master's ving kept his promise (*a*). This doctrine is tantamount to assertion that the general rule as to the effect of a promise applicable only in cases in which the servant continues in e service supposing that the defect has been already nedied (*b*), and would withdraw the question of the master's bility from the jury in every case in which a breach of the omise was shown. But any such rigid presumption would em to be scarcely consistent with a reasonable construction the general principle that dominates cases of this type, ., that the question whether the plaintiff was negligent in ing in the service when he was injured is one of fact to be cided with due reference to all the testimony produced. So as this particular aspect of the question is concerned, the rrect theory would rather seem to be that the servant's ntinuance of work with knowledge that the promised pairs have not been made within the time stipulated merely ords " a very strong argument that the servant is no longer ying upon the promise, but has decided to take the k " (*c*).

That the servant, when he is called upon to work with an pliance which he has ceased to handle since the master omised to repair it, may or may not be justified, according the circumstances, in acting upon the presumption that e repairs have been completed, is clear both upon principle d authority. Thus on the one hand it has been held that employee who knows that the machine at which he works out of repair, and that a fellow servant has been ordered to pair it on a specified day, is guilty of such contributory gligence as will prevent a recovery for an injury resulting m such defect, in subsequently going to work upon the chine of his own accord, without ascertaining whether or

(*a*) *Eureka Co.* v. *Bass* (1886), 81 Ala. 200; *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123; *Gulf, R. Co.* v. *Brentford* (1891), 79 Tex. 619.

(*b*) Wharton on Negl. 221, (adopted in *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123, but disoved in *Greene* v. *Minneapolis, etc., R. Co.* (1884), 31 Minn. 249).

(*c*) *Counsell* v. *Hall* (1883), 145 Mass. 470.

not it had been repaired (*a*). So the servant will be denied recovery where the defect is of such an obvious kind that, if he had been making the ordinary use of his eyesight at the time he was injured, he could not have failed to observe that it had not been repaired (*b*). On the other hand, the right which he has to rely on the master's having performed his duty of carrying out the promised repairs with reasonable promptitude will prevent his being regarded as necessarily culpable, where he has been absent from work for several days after the giving of the promise, and then, without having had an opportunity of examining the machine to which the promise relates, resumes its use in the belief that it has been put in good condition (*c*).

The cases cited in the subjoined note will furnish useful illustrations of the manner in which various courts have treated the question of reasonable time in connection with particular groups of facts (*d*).

VI.—Necessity for showing that the work was continued in reliance upon a promise.—One corollary of the general principle is that, as the master's promise is the new element, the introduction of which deprives the master of the benefit of the presumption which would otherwise arise that the servant accepted the additional risk to which he was exposed, or was guilty of contributory negligence in exposing himself to the risk, a mere protest or complaint by the servant will not be sufficient to overcome that presumption (*e*). Much less will the responsibility be shifted where the complaint is merely that a certain defect increases the difficulty of the work, and not that it is dangerous (*f*).

(*a*) *Schulz* v. *Rohe* (1896), 149 N.Y. 132.

(*b*) *Brewer* v. *Flint, etc., R. Co.* (1885), 56 Mich. 620.

(*c*) *Northern Pac. R. Co.* v. *Babcock* (1893) 154 U.S. 190

(*d*) *Holmes* v. *Clarke* (1861), 7 H. & N. 937; *Eureka Co* v. *Bass* (1886), 81 Ala. 200; *Davis* v. *Graham* (1892), 2 Colo. App. 210; *Cothenberger* v. *Northwestern, etc., Co.* (Minn. Sup. Ct., 1894), 59 N.W. 531; *Weber Wagon Co.* (1891), 40 Ill. App. 585; *Kelly* v. *Fourth of July Min. Co.* (1895), 16 Mont. 484; *Conroy* v. *Vulcan I. Works* (1876). 62 Mo. 35; *Kane* v. *Northern Cent. C. Co.* (1888), 128 U.S. 91; *Flynn* v. *Kansas City, etc., R. Co.* (1883), 78 Mo. 195; *Greene* v. *Mineapolis, etc., R. Co,* (1884), 31 Minn. 248; *International, etc., R. Co.* v. *Williams* (1891), 82 Tex. 342; *Roux* v. *Blodgett L. Co.* (1891), 85 Mich. 519; *Atchison, etc., R. Co.* v. *Lannigan* (1895), 56 Kan. 109.

(*e*) *Railroad Co.* v. *Duffield* (1883), 12 Lea (Tenn) 67; *Texas, etc., R. Co.* v. *Bingle* (1895), 9 Tex. Civ. App.; 29 S.W. 674; *Galveston, etc., R. Co.* v. *Drew* (1883). 59 Tex. 10; *Weld* v. *Missouri Pac. R. Co.* (1888), 39 Kan. 63. Compare *Wheeler* v. *Berry* (1893), 95 Mich. 250, where the protest was against being required to use machinery outside of his regular employment.

(*f*) *Balle* v. *Detroit Leather Co.* (1889), 73 Mich. 160.

Another proposition involved in the general principle is that the servant cannot interpose the giving of the promise as a reason why the defences of assumption of risks or contributory negligence should not be available to the master, unless he actually remained at work on the faith of the promise. The mere fact that he has some suspicion that the master's assurances will not be made good is not enough to deprive him of the benefit of this principle (*a*). But the reliance on the promise must be justifiable under the circumstances. A mere surmise or expectation based on no specific promise will not be sufficient (*b*).

The servant cannot hold the master liable on the theory that he was induced to remain at work where his own testimony shows that he did not anticipate any danger from the source from which it actually came, and he was fully aware of all the risks to which he was exposed (*c*). Nor will a promise enure to the benefit of the servant where it was elicited simply by the master's regard for his own interests, and not by any wish to secure the servant's safety (*d*).

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work (*e*).

The rule does not require that the promise shall be a formal undertaking. Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise (*f*). Nor is it

(*a*) *Weber Wagon Co.* v. *Kehl* (1892), 139 Ill. 644, affirming S C. 40 Ill. App. 584.

(*b*) *McKelvey* v. *Chesapeake, etc., C. Co.* (1891), 35 W. V. 500; *Southern P. Co.* v. *Leash* (1893), 2 Tex. Civ. App. 68.

(*c*) *Haloran* v. *Union I. Co.* (Mo. Sup. Ct. 1896), 35 S.W. 260; *Gowen* v. *Harley* (C.C.A., 1893), 56 Fed. Rep. 973.

(*d*) *Lewis* v. *New York, etc., R. Co,* (1891), 153 Mass. 173; 10 L.R.A. 513; *International, etc., R Co.* v. *Turner* (1833), 3 Tex. Civ. App. 487; *Tesmer* v. *Coehm* (1895), 58 Ill. App. 609.

(*e*) *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148; *Cothenberger* v. *Northwestern, etc., Co.* (Minn. Sup. Ct., 1894), 59 N.W. 551.

(*f*) *Picart* v. *Chicago, etc., R. Co.* (1891), 82 Iowa 148 *Flynn* v. *Kansas City, etc., R. Co.* (1883) 78 Mo. 195 is a case in which the master was held to have bound himself by what was virtually a promise. In the following cases the remarks which passed were held not to amount to a promise; *Shackelton* v. *Manistee* (Mich. Sup. Ct., 1895), 64 N.W. 728; *Fort Wayne, etc., R. Co.* v. *Gildersleeve,*

necessary that the promise should have been addressed to the plaintiff individually, provided it was made in his presence, and the stipulated repairs will remove a danger to which he is exposed (*a*). Whether there was actually a promise to remove the danger is a question for the jury, when it is a matter of implication (*b*).

The weight of authority is to the effect that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger is equivalent in its legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued (*c*). But some courts seem to incline to the view that the situation is not the same in the two cases (*d*).

VII.—By whose promise the master is bound.—The principles upon which it is determined whether a promise, when given by an employee, binds the master, are the same as those which fix the dividing line between a vice-principal and a mere fellow-servant. That is to say, the promise is or is not deemed to have been given by the master according as the employee who gave it was or was not one charged with the performance of that particular duty of the master the breach of which has produced the servant's danger. The plaintiff, in other words, cannot recover on the ground that the promise

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(1876), 33 Mich. 133; *McAndrews* v. *Montana U. R. Co.* (1894) 15 Mont. 290; *Wilson* v. *Winona, etc., R. Co.* 1887), 37 Minn. 326. A servant is not the less justified in relying on the promise because it does not specify any particular time for performance: *Swift, etc., Co.* v. *Madden* (1897), 165 Ill. 41. A promise that a minor employee will be presently removed from a dangerous place of work will enable his father to recover for an injury received before the removal is effected: *Madara* v. *Pottsville, etc. Co.* (1894), 160 Pa. 109. It is scarcely necessary to say that the fact of a promise having been given will not avail the servant, unless it relates to the same danger as the servant's complaint: *Showalter* v. *Fairbanks, etc., Co.* (1894), 88 Wis. 376.

(*a*) *Atchison, etc., R. Co.* v. *Sadler* (1887), 38 Kan. 128; *Alton* v. *Calvey* (1892), 47 Ill. App. 343.

(*b*) *Stoutenburgh* v. *Dow, etc., Co.* (1891), 82 Iowa 179.

(*c*) *Picart* v. *Chicago, etc., R. Co.* (1891), 82 Iowa 48; *Atchison, etc., R. Co.* v. *Lannigan* (1895), 56 Kan. 109; *Atchison etc., R. Co.* v. *Sadler* (1887), 38 Kan. 128; *Chicago, etc., Co.* v. *Van Dam* (1891), 149 Ill. 337, affirming S. C. 50 Ill. App. 470; *Schlitz* v. *Pabst Brewing Co.* (Minn. Supt. Ct. 1894), 59 N. W. 188; *Southern, etc., R. Co.*, v. *Crocker* (1889), 21 Pac. 785; *Sioux City, etc., R. Co.* v. *Finlayson* (1884), 16 Neb. 578; 49 Am. Rep. 724; *Gowen* v. *Harley* (C.C.A. 1893), 56 Fed. Rep. 973.

(*d*) *Sweeny* v. *Berlin, etc., Co.* (1886), 101 N.Y. 520 (remark merely made *arguendo*); *Indianapolis, etc., R. Co.* v. *Ott.* (Ind. App. 1893), 35 N.E. 517. (See, however, the case under the same name in 38 N.E. 842; 39 N.E. 529). In *International, etc., R. Co.* (Tex. Civ. App. 1896), 34 S.W. 161, the court thought that the general principle as to the effect of a promise was not applicable where a section hand was told that a defect in a hand-car would be remedied, and, having been transferred to another car, was injured by the defective car running into it.

s made unless the promisor had authority to take such ps as were appropriate, under the circumstances, to secure e safety of the employees (*a*).

VIII.—Rule where the defective appliance is of a simple kind. The principles reviewed in the foregoing sections have en held by several courts of high authority to be inapplile where the promise relates to implements and tools of a mple kind, such as ladders, spades, axes, &c., the theory ng that the full comprehension which the servant prenably possesses of the dangers incident to the use of such icles, and the facility with which he can secure his own ety, are sufficient reasons for permitting the ordinary rule take effect, that a servant who is injured by an instrument dangers of which he fully understands, is deemed to have en injured by reason of his own fault and negligence. The ding authority for this view is *Marsh* v. *Chickering* (*b*), where vas held that a lamplighter who was injured through the pping of a ladder which the employer had promised to nish with hooks and spikes, could not maintain an action. is decision has been followed in several cases presenting nilar facts (*c*). It is extremely difficult, however, to disver any rational basis for the distinction which the courts ve made between the effects of the servant's knowledge cases of this type and those in which the general rule has en applied. As the servant's full appreciation of the risk he primary and essential circumstance upon which his conbutory negligence is predicated, it should be quite immaterial

(*a*) *Ehmcke* v. *Porter* (1891), 45 Minn. 338. The following cases will furnish illustrations of rule, but the Canadian lawyer should remember that the views of the courts of the different es in the Union are extraordinarily conflicting in regard to doctrine of vice-principalship: t v. *Erie City I. Works* (1892), 149 Pa. St. 263; 24 Atl. 291; *Galveston, etc., R. Co.* v. *Eckols* (1894), x. Civ. App. 429; *Lyttle* v. *Chicago, etc., R. Co.* (1890), 84 Mich. 289; *Patterson* v. *Pittsburgh, etc.,* o., (1874) 76 Pa. 389; *Weber Wagon Co.* v *Kehl* (1892), 139 Ill. 644, affirming 40 Ill. App. 584; *Pieart hicago, etc., R. Co.* (1891), 82 Iowa 148; *Homestake Min. Co.*, v. *Fullerton* (C.C.A. 1895), 69 Fed. 923; *Louisville, etc., R. Co.* v. *Kenley* (1892), 92 Tenn. 207; *Chesapeake*, etc., *R. Co.* v. *McDowell* Ct. of App. 1894), 24 S. W. 607; *Shackelton* v. *Manistee, etc., R. Co.* (Mich. Supr. Ct. 1895), 64 N. 728; *Gulf, etc., R. Co.* v. *Brentford* (1890), 79 Tex. 619.

(*b*) 101 N.Y. 396.

(*c*) *Corcoran* v. *Milwaukee Gaslight Co.* (1892), 81 Wis. 191; *Railway Co.* v. *Kelton* (1892), 55 Ark. ; *Meador* v. *Lake Shore, etc., R. Co.* (1894), Ind. ; 37 N.E. 721 (all cases in which the injury caused by defective ladders); *Gowen* v. *Harley* (C.C.A. 1893), 56 Fed. Rep. 973; *Brewer* v. *Tenee, etc., Co.* (1896), 97 Tenn. 615.

whether that appreciation related to complicated or to simpl instrumentalities. The question whether the knowledge o the conditions which the parties possessed by the parties wa equal would appear to be of no moment except where th continuance of work has been induced both by a promise o repairs and by an assurance that the defect is not so seriou as to threaten immediate injury. It may be a perfectly soun argument that the servant is not justified in relying on th master's judgment in regard to the prospects of safety whil repairs are being made in an appliance of a very simple kind But it is not apparent why, in the case of such an appliance a in the case of any other, the inference may not be drawn tha the master has assumed the responsibility for accidents whil the repairs are being executed, nor why the servant shoul not be entitled to hold the master to the performance of th revived or modified contract which, as we have seen, i implied by a promise to remove a cause of danger.

C. B. LABATT.

OBITER DICTA.

Allen v. *Flood*,—that end-of-the-century crux criticorum—has reaped its first crop of forensic promiscuity in this countr in the case of *Perrault* v. *Gauthier*, decided by the Suprem Court during its February sittings, (28 S.C.R. 241.) We have no space to discuss the facts of the latter case, our present purpos being merely to indicate a curious difference of opinion betwee Girouard and Taschereau, JJ., as to the applicability theret of the ratio decidendi in *Allen* v. *Flood*. Mr. Justice Girouar in the course of a most painstaking judgment (which const tutes, by the way, a valuable comparative study of the Frenc and English laws on the subject of trades-unionism) declare in one place that *Allen* v. *Flood* is "a similar case" to the on then under consideration by the Supreme Court. In anothe place he adds: "the facts in the two cases are very similar i many respects, although in some *Allen* v. *Flood* is much stronge

the non-union men." Again he says; "In the two cases contest was between union men and fellow-workmen . . the members were bound by regulations not to work n outsiders; there was no violence, nor threat of violence; non-union men in both cases were working by the day." act his views throughout appear to proceed upon the ory of legal analogy between the two cases. On the other d, Mr. Justice Taschereau, with all the incisive brevity directness characteristic of his judicial method, thus oses of the pertinency of the English case:—"Tant la cause *d' Allen* v. *Flood*, il me semble que même si la sion de la Chambre des Lords eût été en sens contraire; s avons dans l' espèce un état de choses si différent, que ésultat n' en aurait pas été plus favorable à l' appellant." *gliee*: "So far as the case of *Allen* v. *Flood*, is concerned, it ms to me that even if the decision of the House of Lords had n the other way, we have in the present case a state of s so different that such a result would not have been more ourable to the appellant.") All of which goes to show truth of Pope's aphorism:—

> "Tis with our judgments as our watches—none
> Go just alike, yet each believes his own."

* * *

We are all proud of the splendid axiom of our law that ngland is too pure an air for slaves to breathe in;" but are apt to assign the date of its enunciation to a much too y period in the development of our legal system. This ust phrase was first uttered by the judges in *Cartwright's* in the eleventh year of Elizabeth's reign (Rushworth's t. Collect., vol. 2, p. 468); but the principle that inheres t did not become a sociological factor in English history il some time after that. The Anglo-Saxons imported the ctice of slavery in its worst forms into Britain; and we told that under their domination the peasants were sold cattle, and given away as presents whenever their masters inclined to be generous. (Cf. Stubbs, 1 Const. Hist., 4th

ed. 83; and 1 Kemble's "Saxons," 199). Even that great reformer, Alfred, was not able to secure a larger betterment of the condition of the serfs than subsists in his enactment that a Christian slave, if bought, should be free after serving six years, unless he consented to remain a slave, when his master might "bore his ear at the Church door, and so ear-mark him as his own property." (Paterson's "Lib. of the Subject," vol. 1, p. 490). The term "villein" became substituted for that of "slave" after the Conquest; but it was the merest euphemism until the reign of Edward I. It is sufficient to bring a blush to the cheek of the race who proudly sing: "Britons *never* will be slaves!" to remember that the cardinal liberties obtained by Magna Charta expressly enure to *free* men only. The *Mirror of Justices* naively avers that the serfs were omitted from the benefits of the Charter because they had nothing to lose. (See Selden Society's ed., p. 80). Then in the great struggle for the liberty of the subject that marked the reign of Charles I., we find such advanced democrats as St. John and Littleton declaring that the born freemen of the land were treated by the King and his minions as no better than villeins (3 St. Tr. 86, 1263). Bacon, in his "Maxims," harbours the delusion that "villeinage is part of the law of nature;" while that pious ruffian, Sir Edward Coke (2 Inst. 28), with apparent relish, defines the status of the villein under Magna Charta to be somewhat below that of the brute. In *Sommersett's Case*, Mr. Serjeant Davy, arguendo, (20 St. Tr. 79) makes a witty commentary upon the axiom which is the subject of our present enquiry. He there says:—"The air of England had been gradually purifying ever since the reign of Elizabeth." In that case a negro slave was brought before the King's Bench upon a habeas corpus, and after hearing argument the court discharged him from the custody of his master, whose ship was lying in the Thames. The report of the case is a valuable repository of learning on the subject. It is to be remarked, however, that in the year 1827 Lord Stowell did not find that the air of England had become so surcharged with the ozone of liberty as to enable him to declare that where a West India slave had accompanied

er mistress to Great Britain and then voluntarily returned ith her to her home, the slave was forever purified of the aint of bondage by reason of her temporary residence on Eng- ish soil. (See 2 Hagg. Ad. Rep. 94).

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

MISREPRESENTATION—ADVERTISING GOODS FOR SALE BY RETAIL AT WHOLESALE PRICE—DAMNUM ABSQUE INJURIA.

Ajello v. *Worsley* (1898) 1 Ch. 274, was a somewhat curious ction. The plaintiff, a piano manufacturer, complained that he defendant, a retail dealer in pianos, for the purpose of njuring the plaintiff's trade advertised pianos of the plaintiff's nake for sale by retail at less than the wholesale price, when e had no such pianos in his possession, and he claimed an njunction to restrain the further publication of such advertise- nents. Sterling, J., was of opinion, however, that the plaintiff nad no cause of action, even though the defendant's advertise- ments were a misrepresentation and he was not in fact able to sell the pianos at the price named, and even though it was established by evidence that the plaintiff suffered damage on account of defendant's advertisements; and although the plaintiff's counsel only asked at the bar an injunction restraining the defendant from advertising pianos of the plaintiff's manufacture for sale unless he had actually on hand pianos of the class advertised, yet even in this limited form the injunction was refused. Here again the principle of *Allen* v. *Flood* was invoked, and the doing of a lawful act, though from a sinister motive, was held not to be actionable.

PRACTICE — WRIT—SERVICE OUT OF JURISDICTION — 'NECESSARY PARTY" — ORD. XI., R. 1, (*e*), (*g*): (ONT. RULE 162, (*e*), (*g*)).

In *Deutsche National Bank* v. *Paul* (1898) 1 Ch. 283, a point of practice was decided by Stirling, J., involving the construction of Ord. xi., r. 1, (*e*), (*g*), (Ont. Rule 162, (*e*), (*g*)).

The action was brought by the plaintiff to enforce a charge on two policies of insurance by foreclosure. Two of the defendants were trustees for the plaintiffs of the equity of redemption in the policies, and the other defendant, one Ebbeke, was a subsequent chargee on the policies. Both of the trustees resided within the jurisdiction, and the plaintiffs claimed to be entitled to join Ebbeke, who resided out of the jurisdiction, as a defendant as "a necessary party" to the action against the trustees; but Stirling, J., held that the case did not come within Ord. xi., r. 1, (*e*) or (*g*), (Ont. Rule 162, (*e*), (*g*)), because the action was not founded on any breach of contract, and inasmuch as no relief was asked against the trustees, they were not properly made defendants, but should have been joined as plaintiffs; the action was, therefore, not properly brought against them, and Ebbeke could not, therefore, be deemed a necessary party within the meaning of sub-sec. (*g*). An order authorizing service on Ebbeke was therefore discharged, on Ebbeke's application.

POWER—APPOINTMENT IN FAVOUR OF TRUSTEE FOR OBJECTS OF POWER—LEGAL ESTATE.

In re Paget (1898) 1 Ch. 290, presented for adjudication the question whether, if in the exercise of a power of appointment of realty, the appointment is made in favour of a trustee for the objects of the power, such an appointment is effectual to vest the legal estate in the trustee. Kekewich, J., answered this question in the affirmative, who held that the same rule applied to realty as to personalty in this respect.

SOLICITOR EXECUTOR—WILL—PROFIT COSTS—POWER TO CHARGE PROFIT COSTS—LEGACY—INSOLVENT ESTATE.

In re White (1898) 1 Ch. 297, is a case in which a solicitor who was executor of an estate had power under the will to charge profit costs for professional services rendered by him to the estate. The estate in question was insolvent and the point Kekewich, J., was called on to decide was whether the solicitor was, as against creditors of the estate, entitled to be allowed his profit costs out of the estate; and he came to the conclusion that the power to make the charge was in the nature of a legacy which could not be claimed to the preju-

dice of creditors. According to this decision therefore, a power to make such a charge in favour of a solicitor executor, is nugatory if the estate turns out to be insolvent.

COSTS—TRUSTEES OF IMPEACHED SETTLEMENT, RIGHT OF, TO COSTS—PARTIES BENEFICIARIES—SETTING ASIDE SETTLEMENT.

Merry v. *Pownall* (1898) 1 Ch. 306, was an action by trustees in bankruptcy to set aside a settlement of his life estate made by the bankrupt, whereby, on his bankruptcy, his life interest was cut down. The trustees of the settlement submitted that the beneficiaries entitled under the impeached limitation should be made parties and the plaintiff accordingly added them as defendants. At the hearing it was conceded that the settlement so far as it affected the bankrupt's life estate was void as against the plaintiff, and the only material question which remained was as to the costs. Kekewich, J., held that the trustees having acted properly and not having put the plaintiff to unnecessary expense, were entitled to deduct their costs from the income of the trust estate in their hands notwithstanding the settlement as to the same was set aside. As regarded the beneficiaries he was of opinion that, although they were proper parties, they were not necessary parties, and were not entitled to costs as against the plaintiff or out of the trust estate.

LIS PENDENS—DISCHARGING REGISTRATION OF LIS PENDENS—LIS PENDENS ACT, 1867, 30 & 31 VICT., C. 47, S. 2 - (ONT. JUD. ACT, SS. 97-100.)

Baxter v. *Middleton* (1898), 1 Ch. 313, was an action for specific performance, which had been registered as a lis pendens, and which was, at the trial, dismissed with costs. Upon the application of the defendant, the Court included in the judgment an order under 30 & 31 Vict., c. 47, s. 2, (see Ont. Jud. Act, s. 98), vacating the registration of the *lis*, unless the plaintiff set down an appeal from the judgment within a fortnight. Under the practice in Ontario the registration of the judgment dismissing the action would practically vacate the lis pendens: see *Dexter* v. *Cosford*, 1 Chy., Ch. 22; *Graham* v. *Chalmers*, 2 Chy. Ch. 53; but a question might arise whether a subsequent purchaser would be protected by such registration of the judgment, if on an appeal

to the Court of Appeal it should be set aside; and it seems doubtful whether the incorporation in the judgment of an order expressly vacating the registration of the lis would, in the event of such order being reversed, be a protection to a subsequent purchaser.

COMPANY—WINDING UP—DIRECTORS' FEES—COMPANIES' ACT, 1862 (25 & 26 VICT., C. 89), S. 38, S.S 7.

In re New British Iron Co. (1898) 1 Ch. 324, was a winding-up proceeding, in which the right of directors to rank as creditors, for arrears of fees due to them as directors at the date of the winding-up order, came in question. The articles of association provided that the remuneration of the directors should be the annual sum of £1,000, to be paid out of the funds of the company. This provision, Wright, J., was of opinion distinguished the case from that of *Ex p. Cannon*, 30 Ch. D. 629, and brought it within the principle of *In re Dale*, 43 Ch. D. 255, and the payment of the remuneration to the directors was consequently not dependent on the mere bounty of the shareholders, but that the articles amounted to a contract to pay the stipulated remuneration, and therefore it was not "a sum due to a member" in his character of member, by way of dividends, profits or otherwise, within the meaning 25 & 26 Vict. c. 89, s. 38. The case would be much stronger in Canada, where there appears to be no similar provision in the Dominion Winding-up Act.

COMPANY — WINDING UP — SURPLUS ASSETS—ADJUSTMENT OF RIGHTS OF SHAREHOLDERS INTER SE—EQUALIZATION OF SHARES.

In re Anglo-Continental Corporation (1898) 1 Ch. 327, was also a winding-up proceeding, in which the question arose as to the proper mode of distributing the surplus assets of the company. The shares of the company were of par value of £1 each; 100,000 were issued on which only 5s. each had been paid; 25,000 other shares had been issued which were fully paid up. No calls were ever made. After paying debts and expenses, sufficient assets remained to pay the holders of the 25,000 shares 15s. per share, but insufficient to repay all the paid-up capital on the 125,000 shares. The articles of association provided that, if, on the winding-up, the surplus

assets should be insufficient to repay the whole of the paid-up capital, such surplus should be distributed so that as nearly as possible the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. Under these circumstances Wright, J., held that the holders of the 100,000 shares were liable to a call, actual or in account, of 3s. per share, out of which the holders of the 25,000 shares were entitled to be paid 12s. per share, which would have the effect of making the whole 125,000 shares paid-up to the extent of 8s. per share, and that the surplus was then divisible *pro rata* between the holders of the whole 125,000 shares.

Correspondence.

To the Editor of the Canada Law Journal:

SIR,—Is not the decision in *Piper* v. *Kings Cure Co.*, ante p. 167, strictissimi juris, or even, with deference, of questionable propriety? It appears not to have been the usual case, contemplated in the Rule, of a defendant asking for relief from a judgment entered in consequences of a default in pleading by his own or his solicitor's accidental laches. Then, indeed, we see a reason why the rule should apply that he must produce an affidavit not only alleging but, "showing" merits; but in this case the defendant's solicitor, living in a remote part of the Province, had done all that he could possibly do; his defence, posted in time and properly addressed, went astray in the mails, his solvency was undoubted, and the plaintiff was not to lose a term, except by her own act in appealing. Surely where the default was in the post office, which every one relies on, there is a discretion in the judge to put a defendant in statu quo on a reasonable colour of bona fides, to interfere with which is to put a premium on sharp practice and unduly encourage appeals on matters of minor importance.

JUS.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] WOODBURN *v.* THE QUEEN. [Jan. 17.

Practice—Appeal—Extension of time—Order of reference—Amendment of record—Laches.

An order of reference had been settled in such a way as to omit to reserve certain questions which the Court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement, and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed, and the referee's report filed. After final judgment in the action the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended. Under the circumstances the Court extended the time to appeal but refused to amend the order of reference as settled.

E. L. Newcombe, Q.C., D.M.J., for motion. *R. V. Sinclair*, contra.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] IN RE GROSS. [Feb. 18.

Extradition—Offence referred to by wrong name—Theft—Larceny.

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name. Larceny is by the Ashburton Treaty, the Convention of 1889 and the Extradition Act, specified as a crime for which extradition to the United States will lie, but larceny is not, by that name, recognized as a crime by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing."

Held, affirming the judgment of ROSE, J., that where there was evidence of the commission of the crime of theft the prisoner should be held for extradition, although in the proceedings for extradition the offence was described as larceny.

J. F. Faulds, for the prisoner. *J. W. Curry*, for the Crown.

From Robertson, J.] DWYRE *v.* CITY OF OTTAWA. [March 15.

Injunction—Interlocutory order—Balance of convenience—Municipal corporations—By-laws regulating procedure.

A by-law of a municpal corporation passed under s. 283 of the Consolidated Municipal Act for the purpose of regulating procedure, requiring work exceeding $200 in value to be done by contract after tenders had been called for, was on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms, in pursuance of which the contractors entered into other contracts with the corporation and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:

Held, that as the applicant's legal right was not clear and as serious loss and public inconvenience would necessarily result from granting the order while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.

Judgment of ROBERTSON, J., reversed.

W. Nesbitt, and *H. E. Rose*, for appellants. *McCarthy*, Q.C., and *D. L. McCarthy*, for respondents.

HIGH COURT OF JUSTICE.

MacMahon, J.] MACDONALD *v.* LAKE SIMCOE ICE CO. [Jan 29.

Navigation—Carriage of ice—Right to cut passage through harbour.

The cutting of a channel through ice formed on a water lot in a harbour to enable ice cut outside of such water lot to be conveyed to an ice house on the shore of such harbour, is a use of the said water lot for the purposes of navigation, and therefore the owner of such water lot, whose grant was subject to the rights of navigation, cannot interfere with such user.

W. MacDonald, for the plaintiff. *McPherson* and *Urquhart*, for the defendants.

Divisional Court.] CALLAGHAN *v.* HOWELL. [Feb. 14.

Will—Legatee—Devise of real estate—Payment of legacy out of rents and profits.

A testator, after a bequest of a legacy to the plaintiff, amongst others, made a devise to his daughter M. of "my two farms," describing them, and all the rest of his property of whatsoever kind; and in case of her marriage to her "sole and separate use," and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered, but the daughter took possession of the whole estate and received the rents and profits of the

farms. She subsequently mortgaged the farms and they were sold by a first mortgagee under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee.

Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the said farms, the provision in the will therefor being clear, and was not affected by the subsequent words, or as to the executors "should seem best"; but that her right to arrears of interest must be limited to six years; that the fact that sufficient annual produce of the farms has been received which, if set apart, would have paid off the legacy, was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her said possession and receipt, and her grantee or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed; that said balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that after the payment thereof, it could be paid out to the subsequent mortgagee.

W. H. Blake, for the appellant, H. E. Thompson. *Clute*, Q.C., for the plaintiff. *Mosson*, for the defendant Howell. The other defendants were not represented.

Divisional Court.] HAIGHT *v.* HAMILTON STREET RAILWAY. [March 3.

Street railways—Accident—Negligence—Infirm man.

The plaintiff, an old man, over ninety years of age, lame, very infirm, and almost deaf and blind, while attempting to cross over a street crossing in a city, was run into by one of the defendants' electric cars and injured. The plaintiff was walking at a snail's pace, his manner and actions being strange, and were observed, not only by persons some distance off, who, thinking he was in danger, attempted unavailingly to warn him, but also to the motorman, who thought he might be drunk, and said he could have stopped the car before reaching the plaintiff, had he not thought the plaintiff saw the car and would have got out of the way, but that when he did attempt to stop, it was too late.

Held, that there was evidence of negligence to go to the jury.

Crerer, Q.C., and *P. D. Crerer* for defendants. *J. Lynch Staunton* for plaintiffs.

Meredith, C. J.] [March 11.

SMEDLEY V. BRITISH AMERICA ASSURANCE CO.

Discovery—Production of documents—Contradicting affidavit—Admissions of deponent—Examination for discovery—Documents mentioned in document produced.

Where, in an action upon a fire insurance policy, the plaintiff, in making discovery of documents, referred in his affidavit to the application for the insurance, which, when produced, showed that at its date he had a set of books connected with the business in respect of which he was effecting the insurance, which books, however, he did not produce.

Held, that the books were material, and the reference to them in the document produced was sufficient ground for ordering a better affidavit on production.

Quære, whether the admissions of the plaintiff upon his examination for discovery as to the existence of documents other than those mentioned in his affidavit could be looked at to contradict the affidavit.

Washington, for plaintiff. *H. D. Gamble*, for defendants.

Street, J.] ANDREW v. CANADIAN MUTUAL LOAN CO. [March 19.

Division Court—Attachment of debts—Wrong primary debtor—Same name—Recovery by rightful owner—R.S.O. 1887, c. 51, s. 195.

In an action to recover a sum of money held by a company as a deposit to the credit of the plaintiff in which the company showed that the whole amount had been paid into court and to the creditors of another person of the same name under garnishee judgments in a Division Court, without any knowledge of the mistake being made.

Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover or to protect the defendants against his claim; that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff, but to money which they erroneously supposed was in their hands belonging to the other person

Held, also, that sec. 195 of R.S.O. 1887, c. 51, only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person.

Joshua Denovan, for plaintiff. *Watson*, Q.C., and *A. McLean Macdonell*, for defendants.

Falconbridge, J.] CHAPIEWSKI *v.* CAMPBELL. [March 19.

Free grant lands—Sale of timber by locatee—Subsequent issue of patent to vendor—Estoppel.

A locatee of free grant land under R.S.O. 1877, c. 24, has no power to sell the trees or timber thereon, and the subsequent issue of the patent to him will not feed the estoppel and validate a previous grant or sale.

J. H. Moss, for the plaintiffs. *E. T. English*, for defendants.

Boyd, C.] BAKER *v.* STUART. [April 2.

Devolution of Estates Act—Widow's election—Election more than year from death—Administration by Court—R.S.O. 1897, c. 127.

Appeal from the ruling of Master in Ordinary.

A testator died in August, 1896, and by judgment of March 18th, 1897, in action for construction of his will, an intestacy as to lands was declared, and that the widow was entitled to dower thereout, notwithstanding benefits received by her under the will. A reference to the Master to sell the lands and distribute the proceeds was made, and the lands were sold in October, 1897, and the proceeds were now in Court. On March 14th, 1898, the widow filed a statutory deed of election to take a distributive share of the estate instead of dower.

Held, that notwithstanding R.S.O. 1897, c. 127, s. 13, providing that real estate not disposed of within a year shall vest in the heirs, it was not too late for her thus to elect, the money being in Court and the estate not distributed on the footing of her having retained the right to dower.

E. D. Armour, Q.C., for appellant. *J. H. Moss* for respondent.

Meredith, C.J., Rose, J., MacMahon, J.] [April 4.

CAMPBELL *v.* FARLEY.

Parties—Claim against partnership—Action against surviving partner—Third party notice—Indemnity or relief over—Administratrix of deceased partner—Concurrent administration proceedings—Claim upon collateral security.

An appeal by the defendant Farley from the order of Street, J., ante , setting aside an order permitting the appellant to serve a third party notice upon Jennie MacDonald, was dismissed, the Court agreeing with the opinion of Street, J.

Tremeear, for the defendant Farley. *W. E. Middleton*, for Jennie MacDonald.

Boyd, C.] FLEURY V. CAMPBELL. [April 5.

Discovery—Examination of party—Criminal conversation—Alienation of affections—R.S.O. 1897 c. 73, ss. 7, 9.

An action for criminal conversation and for alienating the affections of the plaintiff's wife is an action instituted in consequence of adultery within the meaning of s. 7 of the Evidence Act, R.S.O. 1897, c. 73, and a defendant in such an action acnnot be compelled to submit to examination for discovery. *Mulholland* v. *Misner*, 17 P.R. 132; 32 C.L.J. 286; *Taylor* v. *Neil*, ib. 134; 32 C.L.J. 286, and *Lellis* v. *Lambert*, 24 A.R. at p. 664, referred to. Sec. 9 of the Act has no reference to such an action.

J. W. McCullough, for the plaintiff. *C. C. Robinson*, for the defendant.

Boyd, C.] IN RE TEASDALL *v.* BRADY. [April 6.

Married woman—Action against—Debt contracted before marriage—Form of judgment—Division Court—After-judgment summons—Disobedience—Order to commit—Contempt—Punishment—Execution.

A married woman was sued in a Division Court for a debt contracted before marriage, and judgment was given against her personally and against another for the amount of the debt.

Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; and an application upon habeas corpus to discharge her from custody under an order made in the Division Court for her committal for failure to attend upon an after-judgment summons was refused. *Scott* v. *Morely*, 20 Q.B.D. 123, followed. *Re McLeod* v. *Emigh*, 12 P.R. 450, distinguished, and doubted in view of *Aylesford* v. *Great Western R.W. Co.* (1892), 2 Q.B. 626.

(*Quære*, whether such an order to commit is by way of punishment or execution.

Shepley, Q.C., for applicant. *W. Cook*, for plaintiff.

Ferguson, J.] REG. EX REL. HALL *v.* GOWANLOCK. [April 7.

Municipal elections—Petition—Concurrent motions—Collusion—R.S.O., 1897, c. 223, s. 227.

Sec. 227 of the Municipal Act providing that where more motions than one are made to try the validity of an election, all shall be made returnable before the Judge who is to try the first of them, and the Judge may give one judgment upon all or a separate judgment upon each one or more of them as he sees fit.

Held, when such a motion was made before a County Court Judge, and it appeared that a prior motion was pending before the Master in Chambers, the former had no jurisdiction to go on and hear the motion before himself, although he found the proceedings before the Master to be collusive.

Prohibition granted.

(Motion to Divisional Court argued April 13th and 14th, 1898, and stands for judgment.)

Marsh, Q.C., and *G. G. S. Lindsey*, for respondent. *Du Vernet*, for relator.

Ferguson, J.] KEEFER *v.* PHŒNIX INSURANCE CO. [April 7.

Insurance—Fire—Vendor and purchaser—Fire after contract of sale—Right of insured to recover whole loss.

Action on policy of insurance for $1,740, insuring Keefer, "his heirs and assigns." Before obtaining the policy, Keefer had, unknown to the defendants, contracted in writing to sell the property for $2,000, of which $1,300 had been paid by the purchaser before the fire.

At the time of sale Keefer and the purchaser verbally agreed that until the purchase money was paid Keefer would keep the property insured for $2,000.

Held, following *Parcell* v. *Grosser*, 1 Atl R. 909 (1885), that the parol contract was a separate and distinct collateral agreement, and evidence of it could be given, as it was not contradictory to the written contract.

Held, also, that "heirs and assigns," in the policy meant heirs or assigns of the property, and the purchaser was an "assign," and that Keefer could recover not only his actual loss ($700) but the residue of the loss by fire also, the latter as trustee for the purchaser.

Collier, for plaintiff. *Aylesworth*, Q.C., for defendants.

Boyd, C.] WILSON V. BOULTER. [April 9.

Parties—Indemnity—Relief over—Third parties—Identity of claims—Negligence—Breach of contract.

In an action to recover damages for injuries sustained by the plaintiff in the defendants' factory in October, 1897, the negligence charged was that there was a defect in the lugs holding fast the doors of a retort, whereby they were broken by the force of steam, and the plaintiff thereby injured from the escape

of hot air, etc., and that the retort was dangerous because not furnished with a safety valve, whereby the lugs were exposed to an undue pressure of steam. The defendants sought to bring in as third parties the manufacturers of the retort, which was made in January, 1896, under written contracts, which contained no warranty, and from which it appeared that the defendants undertook to provide and put in their own fittings, including the safety valve.

Held, that the object of the Rules permitting a third party to be brought into action is to prevent the same question, common as between the plaintiff and defendant and the defendants and the third party, from being tried on different occasions and in different forms, and there was no such identity here; and there could be no claim for indemnity against the manufacturers. If the defendants could recover at all, their damages would be assessed on a different principle from those of the plaintiff; and no relief over could be obtained.

Arnoldi, Q.C., for proposed third parties. *R. McKay*, for defendants. *W. H. Blake*, for plaintiff.

Boyd, C.] DAVIDSON V. COCHRANE. [April 12.

Attachment of debt—Imperfect gift—Assignment of bank account—Vesting.

Mrs. C., the primary debtor, had a savings bank account with a bank. She wrote in her pass-book an assignment of the money in favour of her son, and left the book with a third party to be delivered by him to the son when the latter attained 21 years of age. She did not notify her son of this, nor the bank.

Held, that the assignment to the son was not complete, and the money remained the mother's.

In cases of alleged gift, the test is whether everything has been done that is required in law to be done to transfer the property. If not, the gift is incomplete, the property is still in the alleged donor, and the court will not assist a volunteer to complete what is lacking.

A. P. Poussette, Q.C., for claimant. *Hall*, for judgment creditor.

SURROGATE COURT OF THE COUNTY OF YORK.

RE RENFREW ESTATE.

Probate—Jurisdiction of Surrogate Court—Succession Duties—"Aggregate value."

Held, 1. That the authority conferred by the Surrogate Courts Act has not been limited or interfered with by the provisions of the Succession Duty Act, and that the Surrogate Judge is bound, when requested so to do, to determine whether a particular estate of which probate or administration is sought is liable or not to pay duty.

2. That the whole scope and object of the statute is to tax (1) All the property of a deceased person situate in the Province, no matter where the deceased has his domicile, and (2) In the case of a person dying, domiciled in the Province, to tax all personal property owned by such deceased outside the Province which in the course of administration must or ought to be brought into the Province for administration or distribution to persons or beneficiaries domiciled within the Province.

Expression "aggregate value of the property" defined.

[TORONTO, March 23rd, MCDOUGALL, SUR.J.

The testator died in September, 1897, domiciled in the Province of Que-

c, possessed of an estate in that Province considerably over $50,000, and of estate in the Province of Ontario of a value under $100,000, the aggregate ceeding $100,000. He devised his whole estate, wheresoever situate, to his fe and children. The executors applied to the Registrar of the Surrogate ourt, of the County of York for probate, whereupon the Registrar required e executors to satisfy the Provincial Treasurer as to payment of succession ties (if any). The Provincial Treasurer then made a claim for payment of ccession duties, and refused to authorize the issue of letters probate until e duty had been paid, or the executors had filed a bond to secure the payent of the same. Application was then made to the Judge of the Surrogate ourt, of the County of York, for issue of probate without filing the bond proded for in R.S.O. c. 24, s. 5.

D. T. Symons for the executors. No one appeared for the Provincial reasurer.

McDOUGALL, Sur. J.—The first question to be determined is, Have I jurisdicon to make the order asked for? S. 17 of the Surrogate Court Act, R.S.O. 59, ads as follows: "All jurisdiction and authority, voluntary and contentious, relation to matters and causes testamentary, and in relation to the granting revoking of probate of wills and letters of administration of the effects of ceased persons having estate or effects in Ontario, and all matters arising t of or connected with the grant or revocation of probate or administration all continue to be exercised in the name of Her Majesty, in the several rrogate Courts: but this provision shall not be construed as depriving the igh Court of jurisdiction in such matters." S. 18 further defines the express wers of the Surrogate Court--"To hold cognizance of all matters relative the granting of probates, and committing letters of administration and to ant probate of wills, and committing letters of administration of the goods d persons dying intestate, having property, etc., in Ontario. (2) To hear d determine all questions, causes and suits in relation to the matters aforeid, etc." S. 5 of the Succession Duties Act directs executors and administators to file inventories and lists of persons to whom the property passes, ating the degree of relationship they bear to the testator or intestate, and uqires them to pay the duty or file a bond, the penal sum of which shall be ual to 10 per cent. of the sworn value of the property of the deceased person, iable or which may be liable to succession duty." But by sub-sec. 2 of the me section it is expressly enacted that s. 5 shall not apply to estates in spect of which no succession duty is payable. By s. 13 of the same Act the rrogate Judge is given power to extend the time for the payment of the ty; and by s. 18 he is further given power to make an order for the payent of duty which appears to him not to have been paid in respect of any tate.

It appears to me that the authority conferred by the Surrogate Court Act as not been limited or interfered with by the provisions of the Succession uties Act, and that I am bound, when requested, to determine whether a rticular estate of which probate or administration is sought (in the Surrogate ourt, of the County of York) is liable or not to pay duty. Any judgment I ay pronounce is subject to appeal under s. 36 of the Surrogate Court Act.

Now, as to the merits of the application, s, 2 of the Succession Act defines "property" in the Act as including real and personal property of every description, and every estate and interest therein capable of being devised or bequeathed by will, or of passing at the death of the owner to his heirs or personal representatives. S. 3 enacts, that the Act shall not apply where the property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, son-in-law or daughter-in-law of deceased does not exceed $100,000. Mr. Renfrew bequeathed his whole estate to his wife and children, so that the estate in question comes within this exception unless it exceeds $100,000 in value.

S. 4 defines what property is subject to succession duty: "(a) All property situate in this Province . . . . whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death, or was domiciled elsewhere, passing either by will or intestacy."

Sub-s. 3 reads as follows: "Where the aggregate value of the property of the deceased exceeds $100,000 . . . . passes to wife, children, etc., etc, it will be liable to $2.50 on every $100 of value." Sub-s. 8 is an important sub-section as throwing light upon the intention of the Legislature. This provides that any portion of an estate of any deceased person brought into the Province (whether at the time of his death such person was domiciled in Ontario or elsewhere) by his executors or administrators to be administered or distributed in Ontario, shall be liable to the duty; but it enacts that if such property so brought in paid duty elsewhere, such duty if equal to the Ontario duty will extinguish the same, or if less, the difference only shall be payable to the Treasurer of Ontario. Sub-s. 9 makes an executor or administrator personally liable for the duty, if, in order to escape payment, he distributes assets outside of Ontario; but this sub-section is not to apply to payments made to persons domiciled outside the Province from assets situated outside the Province.

It appears to me that the whole scope and object of the statute is to tax (1) All the property of a deceased person situate in the Province, no matter where the deceased has his domicile, and (2) to tax in the case of a person dying, domiciled in the Province, all personal property owned by such deceased person outside the Province, which in the course of administration must be, or ought to be brought into the Province for administration or distribution to persons or beneficiaries domiciled within the Province. This is a partial adoption or application of the principle of "mobilia sequuntur personam" evolved in the construction of the English Legacy and Estate Duty Acts.

Now, it is unnecessary for me to express any opinion upon the meaning of the expression "aggregate value of the property" as applied to the case of the estate of a person domiciled in Ontario. The matter before me relates only to the estate of a deceased person, who prior to and at the date of his death had his domicile outside this Province. As to such a person I have no hesitation in stating it as my opinion that the expression "aggregate value of the property" can only mean the aggregate value of the property situate in the Province of Ontario, to which would be added any property situate outside the Province but brought into Ontario by executors of such a person to be paid to beneficiaries domiciled in Ontario. It appears to me this is the only property

of a non-domiciled testator or intestate that the Province has the right under our Constitutional Act to tax. See s. 92, B.N.A., sub-heads (2), (13). They cannot tax real or personal property situate outside the Province. That the Legislature appreciated this view is fairly indicated, I submit, by sub-sec. 8 of s. 5 of the Succession Duties Act, where the provision is made that property situate outside is only liable to duty when brought into the Province. It is also shown by the provision of sub-sec. 9 of the same s. 5, which enacts that the executor or administrator shall be personally liable to pay the duty in all cases where he, in order to escape the payment of duty, distributes outside the Province any estate which for the purpose of such distribution ought properly to have been brought into the Province for that purpose. Such would be payments made or shares paid to persons who at the time of such payment or distribution had their domicile in Ontario.

I make the following findings of fact and law :—(1) That the deceased had his domicile prior to, and at the time of his death, in the Province of Quebec ; (2) That the value of his property and estate situated in the Province of Ontario is under the sum of $100,000 ; (3) That as by the terms of his will he devised the whole of his estate in this Province to his wife and children, the said property in this Province, being under the value of $100,000, is not liable to pay succession duty. In case there should be an appeal from this judgment, and to have the facts clearly before the Appellate Court, I further find as a fact ; (4) That the said G. R. Renfrew, at the date of his death, was possessed of, and there passed under his will, property situate in the Province of Quebec, the value of which, if added to the value of the property in this Province, would in the aggregate exceed $100,000 in value.

NOTE.—The following cases may be referred to as bearing on the matter discussed :— *Blackwood* v. *Regina*, 8 App. Cas. 82, and *Henty* v. *Regina*, L.R. (1896) A.C. 567.

In the case above reported, notice of appeal has been given by the Provincial Treasurer.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] POWER *v.* PRINGLE. [March 8.

Pleading, defects in—Duty of trial judge to amend, or give defendant the option of amending—O. 19, R. 27—Pleading disclosing reasonable grounds of defence—Held not objectionable under O. 25, R. 4.

The action by plaintiff, as a solicitor and stipendiary magistrate, to recover a sum of money claimed to be due him for work and labor performed in connection with the collection of certain accounts. The defence set up an agreement that the costs and charges claimed were not to become payable until one H. paid the amount of a judgment recovered against him. Plaintiff

applied under O. 19, R. 27, and O. 25, R. 4, to strike out paragraphs 4 and 5 of defendant's defence, as disclosing no reasonable or legal answer to the action.

Held, 1, that the paragraphs in question were defective in not setting out when the agreement relied upon was made, and whether it was made in writing or by parol, etc., but that where objections of this character are raised, especially in small matters, the proper course is not to strike out the paragraphs, but to direct them to be amended.

2. The case was one in which the Judge of the County Court to whom the application was made should himself have amended the pleadings without waiting to be asked by counsel to do so, and should then have disposed of the case upon its merits, or should have given the defendant the option of amending; and that he was wrong in refusing the application *in toto*.

3. The pleadings were not objectionable under O. 25, R. 4, because they disclosed a reasonable ground of defence, although it was not set up in accordance with the rules respecting pleadings.

4. The order below must be set aside, but the cost below and the costs of the appeal should be made costs in the same, and that defendant should have leave to amend.

F. T. Congdon for appellant. *H. McInnes* for respondent.

Full Court.] CHISHOLM *v.* PETERS. [March 8.

Sale of interest in invention pending application for patent—Mistake of one party not a "mutual mistake"—Word "patent" as used in sales note.

Defendant sold to plaintiff an interest in an improvement made by H. in window sashes, in connection with which an application for a patent was then under consideration in the Patent Office at Washington. A note or memorandum of the sale handed to plaintiff by defendant read as follows:—"460/500 shares in Horton Sash Patent at $2, $920; less by cash $62.50. Settled by note," etc.

The patent applied for was refused on the ground that the improvement claimed was not new, and plaintiff thereupon brought action to recover back the money paid.

Plaintiff's evidence was to the effect that defendant purported to sell him an interest in a patent already granted. Defendant's evidence was that he was interested with H. in an invention called "The Horton Sash Patent," for which they were endeavouring to secure a patent in the United States, with the view of putting the patent upon the market and obtaining a profit therefrom, and that plaintiff purchased the shares knowing this and agreeing to take his chances of the patent being granted and the invention proving profitable. Judgment was given in favour of plaintiff for a return of the money claimed on the ground that there had been a mutual mistake.

Held, that this was wrong and that the judgment must be set aside, the mistake, if any, having only been on the part of plaintiff, and the cause sent back for a new trial, costs to abide the event.

Held, that the terms of the sales' note were in plaintiff's favour but that

it was still competent to defendant to show that the term "Horton Sash Patent" did not imply that the patent had actually been granted, and that plaintiff in getting the interest in the invention got all that he bargained for.

H. Mellish, for appellant. *H. McInnes*, for respondent.

Full Court.] BAULD v. ROSS. [March 8.

Unrecorded deed—Return of, and request to convey to third party—Rights of judgment creditor of grantor subsequently recording his judgment—Registry Act, R.S., c. 84, ss.18 and 21.

M. K. R. conveyed a tract of land, etc., to his son M. D. under an agreement that upon the performance of certain conditions by his other son, P. one-half of the land conveyed to M. D. should be conveyed by him to P. P. performed the conditions named and a deed of one-half the land was made and delivered to him in accordance with the terms of the agreement. P. never recorded the deed made to him, and subsequently at the request of P., and on the return of the deed made to him, M. D. conveyed the land to C. W. R., who paid a portion of the consideration money in cash to M. D., and the balance by a promissory note to P. On March 8th, 1893, subsequent to the making and recording of the deed to C. W. R., plaintiffs recovered judgment against M. D. and registered it so as to bind lands on the same day. Under this judgment plaintiffs sought to bind the interest of P. in the land conveyed to M. D. on the ground that under the Registry Act, R.S., c. 84, ss. 18 and 21 the deed from M. D. to P. was void against a judgment creditor subsequently registering his judgment, and that the title never having been revested in M. D. plaintiffs' judgment took priority over the deed to C. W. R.

Held, that the deed to C. W. R. having been made bona fide and for valuable consideration, there was no legal or equitable right in plaintiffs as creditors of M. D. under which they could avoid it.

Held, also, that plaintiffs did not come within the terms of the statute which only gives precedence over an unrecorded deed, while here there was a recorded deed of the land they sought to bind, which, if in any way defective, the statute gave them no right to attack.

Held, also, that knowledge on the part of C. W. R. of the prior deed to P. was unimportant in an action by plaintiffs.

Plaintiffs' action dismissed with costs, and costs of the appeal.

D. McNeil, Q.C., for appellant. *J. A. Chisholm*, for respondent.

Full Court.] O'HANDLY v. DOOLEY. [March 8.

Magistrate—Action against—Directions to constable held to be mere advice.

The defendant J., as a justice of the peace, issued execution on a judgment recovered by A. against A. O'H. The execution was placed in the hands of the defendant D., a constable, who levied under it upon a waggon upon the premises of the judgment debtor.

Shortly afterwards A. wanted the waggon removed from the premises of A. O'H., where it had been left, and the constable consulted the justice, who

said to him, "Well, if he wants it removed. go and bring it in." There was a dispute as to the ownership of the waggon at the time, plaintiff claiming that it was his property, but it did not appear that the magistrate when he told the constable to bring it in was aware of this

In an action by plaintiff to recover possession of the waggon, which appeared to have belonged to him, it was sought to make the justice liable on account of the direction given to the constable.

Held, that in the absence of evidence that the magistrate at the time he gave the direction to the constable knew of the claim made by plaintiff, his reply to the constable must be regarded as having been made merely as advice, and that in any case the question was one for the trial judge, and a question of evidence merely, and he having determined the question in favor of the magistrate, plaintiff's appeal must be dismissed with costs.

F. F. Mathers and *J. A. Mackinnon*, for appellant. *J. A. Chisholm*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] [Feb. 22.

LE BLANC v. COVENANT MUTUAL BENEFIT ASSOCIATION.

Life insurance certificate—Pleading.

In an action on a life insurance certificate defendants pleaded inter alia that no demand of the amount payable under the certificate was made at their office in Galesburg, Illinois, and by reason thereof by the laws of the State of Illinois the plaintiff could not recover upon the said certificate; and further, that the death of the insured was from a cause exempted by the provisions and agreements contained in the said certificate.

Held, on a motion to rescind a judge's order striking out these pleas, that the plea as to the demand at Galesburg was embarrassing and therefore bad, but that the other plea as to the cause of death was good.

W. B. Chandler, for plaintiff. *A. H. Hanington*, Q.C., for defendant.

Full Court.] ROBICHAUD *v.* LA BLANC. [Feb. 22.

Conviction for stealing trees—Appeal under s. 900, Criminal Code—Title to land—Jurisdiction of magistrate.

Defendant was convicted before a stipendiary magistrate under s. 337 of the Criminal Code, of stealing seven trees the property of the plaintiff. The parties owned and occupied adjoining farms in the rear of which the lands were covered with wood and the dividing line was not distinct. Defend ant, while cutting wood on his own lot, cut seven trees over the line claimed by the plaintiff but within a line which he (defendant) alleged to be the dividing line, and hauled them away. The magistrate found that the criminal intent was proved and that the title to land did not bona fide arise. Defendant appealed under s. 900 of the Criminal Code.

Held, Per TUCK, C.J., BARKER and HANINGTON, JJ., that the conviction ould be attacked on appeal as "erroneous in point of law," that the title to nd was bona fide in issue and the magistrate ousted of jurisdiction, and that nder the circumstances no criminal intent was proved.

Held, by VAN WART, J., that the magistrate having found against the bona des of the defendant, the conviction could not be attacked on appeal as erroneous in point of law" and that the title to land did not bona fide arise.

Held, by LANDRY, J., that the evidence justified the conviction. MCLEOD, , took no part.

W. Van Wart, Q.C., for complainant. *J. D. Phinney*, Q.C., for defendant,

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ull Court] RYAN *v.* MCNICHOL. [Feb. 22.

greement for sale of physician's practice—Covenant not to practice—Injunction.

Plaintiff, a physician and surgeon, who had an established practice at ussex worth about $2,400 a year, contemplating removal to California, entered nto an agreement with the defendant by which he leased to him his office and remises for two years from July 1st, 1894, at an annual rental of $200. The greement contained a covenant by the defendant, as lessee, that he would at he end or other sooner determination of said lease either purchase the plaint- f's house and lot at Sussex at the price of $3,500, or would "forthwith leave nd depart from said parish of Sussex, and would not for a period of at least hree years next thereafter reside in said parish or practice thereat either as hysician or surgeon . . . or elsewhere within ten miles thereof." The laintiff covenanted that he would cease to practice as a physician or surgeon n the said parish for two years from July 1st, 1894, or until breach of some ne or more of the defendant's covenants, and that if the defendant should urchase the house and lot aforesaid he (plaintiff) would not practice his pro- ession in Sussex for three years next succeeding said July 1st, 1894.

Held, on appeal from the judgment of the Equity Court, granting an njunction restraining the defendant from practising at Sussex, that a physi- ian's practice is capable of sale so as to form a consideration for such a cove- ant, and that the covenant was not invalid as being in restraint of trade and ontrary to public policy.

Appeal dismissed with costs.

Leonard Alison and *White*, Attorney-General, for plaintiff. *J. M. Mc- ntyre*, *L. A. Currey*, Q.C., and *C. N. Skinner*, Q.C., for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] WATSON *v.* DANDY. [March 15.

Referee in Chambers, jurisdiction of—Queen's Bench Act, 1895, Rules 26 and 804—Sale of land under registered certificate of judgment—"Now."

Rule 804 of the Queen's Bench Act, 1895, for the first time provided that a Judge in Chambers might make an order on notice of motion for the sale of

land bound by a registered certificate of judgment. Before that it was necessary to file a bill in equity to realize the lien of the judgment. Rule 26 of the same Act empowers the Referee in Chambers "to do such things . . . and exercise all such authority and jurisdiction as . . are *now* done . . . or exercised by him or by any Judge of the Court sitting in Chambers," with certain specified exceptions; and Rule 28 provides that all applications which may be made to the Referee in Chambers shall be so made.

Held, that the Referee has no jurisdiction to entertain application under Rule 804; and that Rule 26 applies only to the powers, authority and jurisdiction which at the time of the coming into force of the Act and Rules; but, independently thereof, a Judge in Chambers had; and it was only after they came into force that a Judge in Chambers could make the order provided for by Rule 804.

Appeal from the Referee allowed with costs, and his order for sale of the land set aside.

Clark for plaintiff. *Hull* for defendant.

Killam, J.] MOORE *v.* KENNEDY. [April 4.

Practice—Setting aside judgment—Leave to defend—Queen's Bench Act, 1895, Rules 339 (a), 655.

The chief point decided in this case is that under rules 339 (a) and 655 of the Queen's Bench Act, 1895, a defendant seeking to set aside a judgment entered by default is not obliged to show the existence of a defence on the merits as clearly as was required in order to set aside a judgment on default of appearance under the Common Law Procedure Act, but there is a discretion to let him in to defend if the Judge thinks that under the circumstances he ought to be permitted to defend.

The plaintiff's claim was for damages for breach of a contract to deliver a quantity of wheat, and the defendant bona fide intended to contest the claim, but made a mistake as to the time of service and tried to put in the defence only one day too late. The judgment signed was interlocutory and an assignment of damages was still required.

Defendant was cross-examined on his affidavit filed on his motion for leave to defend, and it was by no means clear on his own showing that he had a good defence on the merits. The Referee, however, made an order setting aside the judgment and allowing defendant to file a statement of defence on condition of payment of costs.

Held, on appeal, that the Referee had a discretion to allow a defence to be entered and that his order should not be interfered with. Appeal dismissed with costs, to be costs in the cause to the defendant in any event.

Phillips, (Allen and Cameron) for plaintiff. *Metcalfe*, for defendant.

Taylor, C.J.] UNION BANK v. BARBOUR. [April 11.

Fraudulent conveyance—Bona fide purchaser—Garnishment.

Plaintiffs, who had recovered a judgment against James Barbour, in 1896, brought the present action against him and his wife, and one Warman, for the

purpose of realizing the amount of their judgment out of a parcel of real estate which they claimed to have been conveyed by Barbour to his wife with intent to defeat and defraud them. Mrs. Barbour had afterwards sold the property to Warman; but he had not paid his purchase money in full, and the plaintiffs alleged that the money still due from Warman to Mrs. Barbour was really the money of James Barbour, and ought to be made available for payment of their judgment, and that Warman should be ordered to pay to them a sufficient amount of the purchase money to satisfy their judgment and the costs of the suit. There was no doubt in the mind of the learned Judge that the conveyance to Mrs. Barbour was fraudulent against creditors, but Warman by his statement of defence claimed to be a bona fide purchaser of the property for value, and that he had paid all of the purchase money except $365, and stated that he was ready and willing to pay this over in accordance with the directions of the Court. The plaintiff's counsel at the trial accepted Warman's statement that he was a purchaser for value, and as to the amount still due from him.

Held, following *Stuart* v. *Freeman*, 3 O.R. 190; *Tennant* v. *Gallow*, 25 O.R. 56; and *Ross* v. *Dunn*, 16 A.R. 552, that the right of a plaintiff to attack a transaction by which property is conveyed by the judgment debtor to a fraudulent grantee is derived from the statute, and goes no further than the setting aside of the fraudulent conveyance, and that a creditor cannot take proceedings for that purpose after the property had passed from the hands of the fraudulent grantee into those of a purchaser for value. If Mrs. Barbour had sold the property and received the money, the plaintiffs could have no remedy against her, neither could they have any right to call upon a bona fide purchaser from her to account for any money still remaining due.

Masuret v. *Stewart*, 22 O.R. 290, dissented from.

Action dismissed without costs as against the Barbours. Defendant Warman held entitled to his costs.

Taylor, (Souris,) for plaintiff; *Acheson*, for the Barbours; *A. D. Cameron*, for Warman.

Killam, J.] MCILROY *v.* MCEWAN. [April 19.

County Courts Act, R.S.M., c. 33, s. 37—Counter claim—Jurisdiction of County Court—Transfer to Queen's Bench.

In this case the defendant put in a counter-claim for an amount beyond the jurisdiction of the County Court, without abandoning the excess as required by s. 67 of the County Courts Act, R.S.M., c. 33, and then applied for an order to transfer the action to the Court of Queen's Bench.

Held, that the condition to the right to set up the counter-claim at all under s. 67 was the abandonment of the excess, and it should either be deemed to have been abandoned, in which case a transfer to the Queen's Bench is not authorized, or the counter-claim was improperly put in for the whole amount, in which case the defendant could not by so doing obtain a right to have the action removed into the Queen's Bench, or to take away the plaintiff's right to have his claim tried in the County Court. Application dismissed without costs.

Hull, for plaintiff. *Bradshaw*, for defendant.

Province of British Columbia.

EXCHEQUER COURT.

ADMIRALTY DISTRICT

Davie, C.J., McWHA *v.* THE "PENTICTON."

Judgment in rem—Execution in personam.

Judgment having been given against the ship and execution issued but returned nulla bona, application was made for judgment against the owners. The Court having been satisfied by the evidence that B was the owner, though not registered as such and though appearance had been entered in the name of the ship and not of the owner,

Held, that the plaintiffs were entitled to their order chiefly on the authority of *The Dictator*, P.D. (1892) 304, where it was decided that in case of an execution on a judgment in rem being returned unsatisfied, leave may be given to sign judgment and issue execution against the owners.

SUPREME COURT.

Walkem, J., McColl, J., Irving, J.] [April 1.

GWILLIM *v.* LAW SOCIETY OF BRITISH COLUMBIA.

Legal Professions Act, 1895, s 37, sub-sec. 5—Construction of.

This was an appeal by the defendants from an order made by Mr. Justice Drake whereby the defendants were ordered by their proper officer to enter the name of the plaintiff on their books as an applicant for admission as a solicitor of the Supreme Court of British Columbia as of 15th July, 1897, and declaring him entitled to be admitted after the expiration of six months residence and compliance with the rules of the Law Society. The plaintiff was admitted as an advocate in the North-West Territories after a three years' studentship as prescribed there. He was afterwards and without any further probation admitted in Manitoba, a Province in which students and articled clerks are required to study or serve under articles, as the case may be, the term of five years before call or admission. Sub-sec. 4 of s. 37, of the Legal Professions Act, 1897, British Columbia, lays down a standard of qualification for the position of solicitor. "With respect to residents of this province, a studentship, under a practising solicitor, of five years' duration, reducible to three years in the case of graduates of any recognized university of the United Kingdom or Canada, is, amongst other things, required; and with respect to solicitors of the United Kingdom, or any of the superior courts of the colonies, or of the provinces of Canada, who come here for admission, a probationary term of six months has to be spent."

Then follows sub-sec. 5: "Provided, also, that any barrister or solicitor who shall base his claim for call or admission upon his having been called or admitted, as the case may be, as a barrister or solicitor in some place or Pro-

ince where barristers or solictors are called or admitted after a term of study r articles less than five years (except in the case of a graduate of any recog-ized university of Great Britain or Ireland, or the Dominion of Canada), ust, before call or admission in this Province, serve as a student-at-law, or nder articles, for a sufficient time to complete the full term of five years."

The defendants contended that the plaintiff came under the provision of ub-sec. 5, and therefore, would have to serve under articles for the further erm of two years.

Held (IRVING, J., dissenting), that the whole Act must be read together, nd the words "bases his claim for admission," are not to be construed liter-lly so as to defeat the object of the Act, which establishes a standard of five ears service ; and that the plaintiff having served only three years in the N. V. T., did not, by his subsequent admission in Manitoba, bring himself outside he provisions of sub-sec. 5.

Per WALKEM, J.,—Reading the two sub-sections together, it seems to me nat the Legislature has plainly said : "Our standard of qualification is, amongst ther things, a studentship, in the case of residents here, of five years, reduc-ble to three years in the case of university graduates, and in the event of any ther Province or place having a similar standard of service, its practitioners ill be admitted without any further service ; but should its term of service be ess than five years—save as to university graduates—the full service of five ears shall be completed here."

Appeal allowed without costs, defendant's counsel stating that the Society id not ask for costs, and had agreed to pay the plaintiff's costs of the appeal.

A. E. McPhillips, for appellants ; *A. L. Belyea*, for respondent.

North-West Territories.

SUPREME COURT.

Richardson, J.] BANK OF MONTREAL v. RICHARDSON. [March 31.

Married woman—Separate estate—Contract of married woman—Separate estate exigible—Estoppel—N. W. T. Act, s. 40.

Plaintiff sued husband and wife claiming $7,000 on a promissory note gned by both defendants in favor of L. S. & Co., and endorsed to plaintiff. he principal defence was that the wife was at the time of the making of the ote a married woman residing with her husband, and was not possessed of ny separate property. The evidence showed that the wife previous to the gning of the note had assigned to L S. & Co. her interest in an agreement r sale by the C.P.R. to her of 640 acres of land : that although the assign-ent was absolute in terms it was given as collateral security for the debt, hich latter was represented by the note n question. The agreement with the .P.R. for the purchase of the land was made in the wife's name, although the usband swore he himself paid the instalments of the purchase money. The

husband had himself prepared and delivered the assignment to L. S. & Co. It also appeared that the wife subsequently to assigning to L. S. & Co. assigned the land and agreement to T. & Co., who, thereafter and before the commencement of the action, paid the balance due to the C.P.R. Co. and obtained a deed of the land. It was urged on behalf of the wife, relying on *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454, that admitting the wife had separate estate at the time of the contract, she had since ceased to be possessed of any, and that there could not now be a judgment against her on the contract. For the plaintiff it was contended a judgment would bind not only the property she was possessed of or entitled to at the date of the note sued on, but also all or any property thereafter acquired by her, and in support of this contention plaintiff relied on *Wagner* v. *Jefferson*, 37 U.C.R. 577; *Moore* v. *Jackson*, 22 S.C.R. 239. Plaintiff's counsel also urged that the defendants having represented that the wife had an interest in the land and thereafter assigned that interest, they were estopped from setting up that it was not the wife's property.

Held, that there should be judgment against both defendants for full amount of claims and costs. That the interest of the wife in the land was separate estate. That the judgment as against her, following *Scott* v. *Morley*, 20 Q.B.D, should be a proprieatry one and be limited to her separate estate. That the defendants having represented the land as the wife's property were estopped from now claiming it was not then her separate estate.

Hamilton, Q.C., for plaintiff. *H. A. Robson*, for defendants.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

Rouleau, J.] IN RE HANEY *v.* MEAD. [March 24.

Coroner—Doctor who attended deceased not competent to hold inquest.

This was an application of M. J. Haney, manager of construction of Crows Nest Railway for a writ of prohibition to prohibit Dr. H. R. Mead, of Pincher Creek, from further proceeding with an inquest in connection with the deaths of two men from diphtheria, employed by a contractor on the said railway. The grounds upon which the application was made were: 1. That the coroner had no jurisdiction to hold such inquest. 2. That he was a necessary and material witness upon said investigation and inquest. 3. That he was directly and personally interested in said inquest and investigation.

The facts as set out in the affidavits read on the application were that the two men in question were brought in the company's ambulance to the end of the track, and Dr. Mead, the said coroner, was immediately called in to attend them. Both men died the night after their arrival while under Mead's care. Mead then proceeded to hold an inquest upon the said deaths although it had been pointed out to him by counsel (C. E. D. Wood) for applicant that having been in professional attendance upon the men at the time of their death he would be a necessary witness, and it was not proper for him to act in the dual capacity of judge and witness.

Held, that a coroner is a judge of a court of record, and that the same

person cannot be both a witness and a judge in a cause which is on trial before him; and that in this case the coroner was a necessary witness. In delivering judgment the judge said: "In this case there is a dangerous precedent to be avoided. A physician, who is at the same time a coroner, in order to avoid prosecution for malpractice, would have only to call a jury and hold an inquest on the body of his victim and the law would be powerless to prevent him."

Ordered granted for writ of prohibition.

The following cases were referred to in the judgment: *Queen* v. *Farrant*, 57 L.J.M.C. 17; Greenleaf on Evidence, 14th ed., s. 369; *Reg.* v. *Sproule*, 14 O.R. 375; *Reg.* v. *Brown*, 16 O.R. 41; *People* v. *Miller*, 2 Park. Crim. Rep. 197; *People* v. *Dohring*, 59 N.Y. 374.

James Muir, Q.C., for applicant. *R. B. Bennett* for coroner.

Book Reviews.

The Rating of Mines and Quarries, by ARCHIBALD BROWN, M.A., of the Middle Temple, barrister-at-law. London: Butterworth & Company, 7 Fleet street, Law Publishers, 1898.

This is a short summing up of the law of rating generally. and it has special application to mines, iron works and quarries. It has special application to the law as it stands in Great Britain, but the instances and illustrations will occasionally be found applicable in this country, and there are now many in this country, which is showing signs of being the greatest mining country in the world, who desire all information attainable in these matters.

The Law of Meetings, by GEORGE BLACKWELL, LL.B., Inner Temple, barrister-at-law. London, Butterworth & Company, 7 Fleet street, Law Publishers, 1898.

This little book relates to meetings convened for social, political and other purposes, by persons under no legal liability to hold such meetings, and meetings convened by corporate bodies, to discharge their statutory or common law duties. The profession are largely familiar with the law contained in this book, so far as it is of general application.

Outlines of Law of Torts, by RICHARD RINGWOOD, M.A., of the Middle Temple, barrister-at-law, etc. Third edition London: Stevens & Haynes, Law Publishers, Temple Bar. 1898. 289 pp.

The first edition of this book was based upon a course of lectures on the law of torts delivered by Mr. Ringwood when lecturer on Common Law for the Council of the Incorporated Law Society. In the present edition many fresh cases of importance have been added, and the recent judgment of the House of Lords in *Allen* v. *Flood* (1898), App. Cas. 1, is discussed. The writer also deals with Workmen's Compensation Act, 1897, and notes the decisions on the Employer's Liability Act, 1880.

Flotsam and Jetsam.

SOME LEGAL RESULTS OF WAR.—In the event of a war between the United States and Spain, the effect upon English commerce is a matter which has excited some attention.

One result of the outbreak of war would be that either belligerent would have the right to search any merchant vessel upon the high sea to ascertain its nationality and the nature of the cargo on board. Resistance to the right of search, according to the rule which has been emphatically affirmed in the British Prize Courts, renders the ship liable to condemnation.

The United States and Spain are not parties to the Declaration of Paris. Consequently they are not bound by the rule that the neutral flag covers the cargo. Therefore a British ship carrying a cargo belonging to either belligerent could be taken by a ship of the other belligerent to a convenient port for the purpose of having the cargo condemned. Under such circumstances the usage is for the captor to pay freight to the captured ship.

Goods which are contraband of war, destined for the use of the enemy, are liable to confiscation, and freight is not allowed in respect of them to the carrier. The carriage of contraband goods does not, however, according to the prize law of most countries, render the ship liable to any other penalty in the absence of fraud or other aggravating circumstances. There are dicta in one or two English cases that when the shipowner is privy to the carriage of contraband goods, his ship is liable to condemnation; but there is no English or American case in which such a principle has been clearly established.

A ship which violates an effective blockade is, together with the cargo, intended for the blockaded port, liable to capture.

It is, however, clearly established that by English law trade in contraband goods or to a blockaded port is lawful for a British subject when this country is neutral. Therefore a charter made by a British shipowner for the purpose of running a blockade could not be repudiated by him. On the other hand, performance of a contract to carry goods to a port which, before the loading, becomes blockaded, is excused when the charter contains an exception of restraints of princes. And even without this exception the shipowner would, it is thought, not be bound to carry out his contract, on the ground that the adventure had been frustrated by circumstances not contemplated when the contract was made.—*Law Journal*, (*Eng.*)

At a New England society dinner some years ago, Mark Twain had just finished a piquant address when Mr. Evarts arose, shoved both of his hands down into his trousers pockets, as was his habit, and laughingly remarked: "Doesn't it strike this company as a little unusual that a professional humorist should be funny?" Mark Twain waited until the laughter excited by this sally had subsided, and then drawled out: "Doesn't it strike this company as a little unusual that a lawyer should have his hands in his own pockets?"

Canada Law Journal.

VOL. XXXIV. MAY 16, 1898. NO. 10.

The annual meeting of the Canadian Bar Association will be held at the city of Ottawa on the 18th and 19th insts. We understand that international subjects will be largely in evidence.

The sudden death of D'Alton McCarthy, Q.C., M.P., will be received with universal regret. The profession has been deprived of one of the most brilliant advocates and soundest lawyers that has ever adorned its ranks. As a public man he had statesmanlike ability of the highest order, and it may as truly be said of him as of any knight of old that he was without fear and without reproach. The tragic circumstances attending the accident which caused his death are known to all. He never rallied, and only to a certain extent recovered consciousness, passing away on the evening of the 11th inst. at the age of 62, having been, up to the time of the accident, in full vigour of mind and body.

Our namesake of Albany again refers to the law which at present compels witnesses to "kiss the book," on tendering their evidence. It is a time-honoured custom, of no value in itself and with many disadvantages. We are told that Maryland has just placed upon the statute book a law abolishing the practice, and substituting therefor the more solemn and decorous form of swearing by uplifted hand. Three years ago Pennsylvania did the same, and others of the States will probably follow their example. This would seem distinctly better than the practice of applying the lips to a generally filthy article, or to the provision which obtains in some countries of providing Bibles covered with celluloid or other washable material.

Decisions affecting the ubiquitous bicycle and its rider will soon take a volume to themselves. Our friends of the wheel will take some comfort from the recent dictum of a Maryland judge, to the effect that where a street is impassable it is no a breach of a town ordinance prohibiting the riding of wheels on sidewalks, to leave the roadway and use the sidewalk. In the case before him the rider turned on to the sidewalk to avoid a bad place in the roadway, which the evidence showed was impassable for a bicycle. He was promptly collared by a policeman, but it was held that his excuse was sufficient. The question as to whether bicycles are to be classed as necessaries for an infant has also recently been discussed. The Appellate Division of the New York Supreme Court recently held that a bicycle is not an article of necessity for a girl seventeen years old, who lives in the house of her employer. It appears that she had agreed to pay $45 for a wheel, but returned it after paying only part of that sum. It was held that she was entitled, on the ground of infancy, to recover all that she had paid. In England an infant of nineteen, an apprentice, purchased a racing bicycle from the plaintiff company, and having ridden it for some time, and won races therewith, declined to pay the purchase money. The Judge of the County Court at Leicester held that the bicycle was "necessary." This judgment was sustained by the Queen's Bench Division. It would rather seem that here, as in many other instances, hard cases make bad law. We fail to see where the necessity comes in, though many find it a luxury, and a very convenient mode of progression.

A new series of Canadian reports devoted exclusively to criminal and quasi criminal cases has just been announced to be published by the Canada Law Journal Company. It is thought that it will be sure to meet with the encouragement and patronage which a work of such importance demands. The need of a series of "Canadian Criminal Cases," the title very aptly chosen for the work, has been manifest for a long time but more particularly since the passing of our Criminal

le in 1892. It is expected to include, at the rate of one ume per annum, not only all current cases, but all portant decisions under the Code since its institution. notations following the full report will make this series mplete commentary on Canadian criminal law and practice, h the advantage of its being brought up to date from e to time with each succeeding number. The editorial nagement has been undertaken by Mr. W. J. Tremeear, of Toronto Bar, who will, we doubt not, do his work with e and efficiency.

There has been some adverse criticism in this country on the action of the United States in beginning hostilities ainst Spain by seizing her merchant shipping before king a formal declaration of war. There is, we think, no stantial reason to be urged in support of this view. While otius and others of the earlier writers on International w undoubtedly favor the necessity of formal notice before commission of an act of war, owing to the increased ilities of their times for communication between States l their representatives abroad, modern publicists hold that s not necessary to make a solemn and formal challenge to enemy in order to legitimate acts of hostility directed ainst him. (See Walker's Science of International Law, 242, and Hall's International Law.) Even so early the seventeenth century the practice of making formal larations of war began to fall into disuse. Blackstone, it rue, states that formal notice is necessary (1 Comm. 258); the English repudiated his opinion by their unannounced zure of the Danish fleet in 1807, and on other occasions. *Oom* v. *Bruce*, 12 East 226, Lord Ellenborough said that ormal declarations of war only make the state of war more torious; but though more convenient in that respect, are t necessary to constitute such a state." See also the Nayade," 4 C. Rob. 251; the "Eliza Ann," Dods. 247; and "Hiawatha," Blatch. (Prize Cas.). The fact that formal larations were issued before the Italo-Austrian war in

1866, the Franco-Russian war in 1877, and the Russo-Turki war in 1853, does not demonstrate that there was any leg necessity to make the same. Spain must blame her lack "alert militarism" for her great losses at the outset of t conflict. All through the long diplomatic controversy p liminary to the beginning of hostilities she appeared to ha been actuated by the belief that the Americans were on "bluffing." She took her chances with her eyes open, a cannot blame her reverses as due to any breach by her adversa of the international etiquette of war.

EXECUTIONS AGAINST LAND.

The last number of the Ontario Reports includes the de sion of Ferguson, J., in *Neil* v. *Almond*, 29 O.R. 63, whi will prove quite a surprise to many practitioners. There h been for many years past a sort of tacit understanding in t profession that by keeping a writ of fi. fa. lands renewed, t right of the execution creditor against the lands of his debt under the writ might be preserved for an indefinite numb of years, and that any sale which might be made by t debtor of his lands whilst the execution was in the sherif hands would be liable to be defeated by a sale had under t writ. The case of *Neil* v. *Almond* seems to show that this vie of the law is erroneous. The facts of that case were as f lows: Job Almond placed a writ of execution against t lands of James Ellis in the sheriff's hands, on 20th April, 18 which was kept duly renewed. In 1885 Neil purchased c tain lands of James Ellis, which were bound by the writ, which Neil had no actual notice. Neil subsequently, in 18 mortgaged the land to the Canada Permanent L. and S. C which mortgage at the time of the action was still subsistin It having been discovered that the lands were still subje as was supposed, to Almond's execution, the sheriff was abo to offer them for sale thereunder, when Neil commenced action to restrain further proceedings under the executi against the lands so purchased by him. He contended t the execution creditor's claim under the writ was govern

R.S.O. (1887), c. 111, s. 23 (R.S.O. 1897, c. 133, s. 23), ich provides that no action "or other proceeding" shall brought to recover out of any land any sum of money ured by any mortgage or lien, or otherwise charged upon payable out of such land, but within ten years next after present right to receive the same accrued to some person able of giving a discharge for, or release of the same, ess in the meantime payment or acknowledgment be made given by the party by whom the same is payable.

The learned Judge holds that the execution of a writ of fa. is a "proceeding" within the meaning of that section, d that unless it takes place within ten years from the time writ was first placed in the sheriff's hands the statute erates as a bar to the execution of the writ. This, as we ve already remarked, is a very important—and we may add, thout any intention of impugning its accuracy—a very sur-sing decision, because, as we have already observed, we nk the general opinion of the profession has been the ner way.

The wording of the section would rather tend to the con-sion that the liens referred to therein, and intended to affected thereby, are liens created by the act of the rties, and not liens arising by operation of law as a result legal process. The words "no action or other proceeding all be brought" to recover money secured by any lien, are rtainly not very happily chosen, if they were intended to ply to executions. The writ itself by its delivery to the eriff is the lien, it is also itself "the proceeding" by which e lien is enforced, no other "proceeding," as far as the ecution creditor is concerned, being necessary to enforce it, d with all due respect to the learned judge, there seems to room for contending that the "proceeding" which the tute contemplates, is a "proceeding" by the party and not the officer of the court in execution of its process.

In both *Smith* v. *Brown*, 20 O.R. 165, and *Casper* v. *Keachie*, U.C.R. 599, referred to by the learned judge, the acts hich were held to be "proceedings" were acts of the party, d therefore those cases are really no authority for the pre-

sent decision. The point involved is certainly a very nic one, and one which we venture to think would bear furth ventilation.

BILLS OF EXCHANGE ACT, 1890, AND AMENDMENT

It was anticipated that the practical identity of the Bil of Exchange Act, 1890 with the Imperial Act of 1892 woul give special value to the English judicial decisions. Th omission of s. 60 of the latter Act was a very importa divergence, and has led to far more reaching results tha were foreseen.

This is exemplified by the judgment in *London and Riv Plate Bank* v. *Bank of Liverpool* (1896) 1 Q.B. 7. The fac were briefly as follows: In 1893 Hippolyto Garcia, a mercha in Monte Video, purchased at the plaintiffs' branch there draft at 120 days on the plaintiffs in London, payable to th order of Fueyo & Co. The bill was drawn in three part and on April 19th Garcia sent the first of exchange to th payees in Havana in payment of an account. On Apr 23rd he wrote again enclosing the second of exchang Neither of these letters ever reached Fueyo & Co. On Jun 20th a person calling himself Pedro Garcia was introduced Messrs. Loychate & Co., of Havana. He produced the fir and second of exchange of the draft purchased by Hypoly Garcia at Monte Video, and asked them to discount the bi It then bore the forged indorsement of Fueyo & Co. It wa forwarded to the agents of Loychate & Co., at Liverpool, b whom it was paid into their account at the Bank of Live pool, and it was subsequently paid by the plaintiffs to th bank. On the discovery of the forgery some months afte wards this action was brought against this bank, and th Liverpool agents of Loychate & Co., as money received b the defendants for the use of the plaintiffs.

The trial took place before Mathew, J., in the Commerci Court, and with the result that the action was dismissed wit costs. In the course of his judgment the learned judge la stress upon the principle that if there is an interval of tim

which the position of the holder may be altered the money
ıce paid cannot be recovered back. "That rule," he con-
nued, "is obviously, as it seems to me, indispensable for the
nduct of business. A holder of a bill cannot possibly fail
have his position affected if there be any interval of time
ıring which he holds the money as his own, or spends it as
s own, and if he is subsequently sought to be made respon-
ble to hand it back." This case is therefore authority "that
hen a bill becomes due and is presented for payment, and is
id in good faith, and the money is received in good faith, if
ch an interval of time has elapsed that the position of the
lder may have been altered, the money so paid cannot be
covered from the holder, although indorsements on the bill
bsequently prove to be forgeries." In Canada this rule is,
bject to the amendment hereinafter referred to, applicable
cheques as well as bills and notes. In England, by force
s. 60, it is limited to the two latter instruments.

This decision caused a good deal of concern amongst
nkers here, as it practically left them without legal recourse
they had the misfortune to pay a bill or cheque bearing a
rged indorsement. In England the danger was confined to
stomers' bills and drafts at short dates drawn by other
nkers. The banks in Canada were on the other hand not
otected in the case of cheques payable to order. The only
se in which the bank was protected was when the person to
hom the money had been paid by mistake had not changed
s position. In the case in question the Bank of Liverpool
uld have been seriously compromised if they had been
mpelled to repay the money, as they had lost their right of
ving notice that the bill had not been paid.

In an able article in the *Canadian Journal of Commerce*,
97, at p. 242, it is pointed out that the "altered position may
ve occurred in a very short time." Another writer says,
Negligence is immaterial, and if the holder has had the
oney during any period, however short, during which his
sition may theoretically have been altered, you cannot
uch him. And this practically cuts your chances down to
l. Short of catching him within five minutes after he
aves your bank I don't see how you can do anything."

The decision was not indeed new law. In *Cocks* v. *Masterman*, 9 B. & C. 902 (1829), it was laid down that the holder of a bill is entitled to know on the day when it becomes due whether it is honoured or dishonoured, and that no notice of the forgery having been given on the day the bill becomes due the parties who had paid the money were not entitled to recover it back. There the bankers had paid an acceptance which was discovered afterwards to have been forged, and had the following day given notice of the fact to the party who had received the money.

The attention of the then Minister of Justice having been drawn to the danger, he introduced the last amendment to the Act. This enactment 60 & 61 Vict., c. 10, s. 2, after repealing s. 24, sub-s. 2 of the original Act, added by 54 & 55 Vict., c. 17, s. 4, provides that:

"2nd. If a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid, or from any indorser who has indorsed the bill subsequently to the forged or unauthorized indorsement, provided that notice of the indorsement being a forged or unauthorized indorsement is given to each such subsequent indorser within the time and in the manner hereinafter mentioned; and any such person or indorser from whom said amount has been recovered shall have the like right of recovery against any prior indorser subsequent to forged or unauthorized indorsement. 3rd. The notice of the indorsement being a forged or unauthorized indorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the indorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way as notice of protest or dishonour of a bill may be given or addressed under this Act."

It is not known that there is any similar enactment in England. The amendment will in practice occasion consid

able difficulty. In the first place it may be pointed out that only applies to indorsements and will not afford any relief banks paying forged acceptances or drafts, but leaves the w as to them as it was before. The words "reasonable me" in sub-s. 3 are somewhat unfortunate. It might have efined what would be a reasonable time. Doubtless the ame rule would be applied as in giving notice of dishonour f a bill or note, i.e., it will be in time if given not later than he following day.

But a more serious difficulty arises from there being no imitation of the time within which the discovery may be nade and its consequent remedy resorted to. In practice the Act will no doubt be chiefly confined to cheques. Most customers have monthly settlements with their banks, although not always so. Many customers, especially outside of the business classes, allow long periods to elapse without ever calling for their cheques. But even otherwise, cases may arise where a cheque apparently paid to the proper person may afterwards prove to have been paid on a forged or unauthorized indorsement. A right of action arises on discovery of the fact and notice given. Will this right exist after six years? Is the customer of a bank whose cheque is so pai "a person on whose behalf such payment is made?" The value of crossing cheques and thus acquiring the protection of the Bills of Exchange Act will be in consequence of this legislation more than ever manifest.

E. H. SMYTHE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

RAILWAY—INTERFERENCE WITH ROAD—PENALTY FOR NOT SUBSTITUTING SUFFICIENT ROAD—RAILWAY ACT, 1845 (8 & 9 Vict., c. 20), ss. 53, 54—(RAILWAY ACT, 51 VICT., c 29, s. 183 (D.)

In *Llewellyn* v. *Vale of Glamorgan Ry. Co.* (1898) 1 Q.B. 473, an appeal was had from a decision of Wright, J. (1897) 2 Q.B. 239. The action was brought to recover a penalty from a railway company for not providing a sufficient road in place of a private road at a place where the same was interfered with by their railway. The English Railway Act imposes a penalty of £20 a day, payable "to the owner" in case of a private road, for every day during which the substituted road shall not be made. The plaintiff was only a part owner of the road interfered with, and the defendants contended that all other co-owners were necessary parties. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) overruled this objection, and held that any owner of any part of the road interfered with might recover the penalty for his own use, and that only one penalty was recoverable. The Dominion Railway Act (51 Vict., c. 29), s. 183, only applies to highways, but the penalty thereby imposed would appear also to be single.

ELECTION—RECOUNT OF VOTES.

Monkswell v. *Thompson* (1898) 1 Q.B. 479, was a case stated under the Municipal Corporations Act. The point presented for the decision of the Court was a very simple one. There were eight candidates for a school board election. The first five were declared elected. A petition was presented against the return of the candidate who stood fifth on the list, on the ground that the candidate who stood sixth on the list had really the larger number of votes, and a recount was ordered of the votes cast for these two candidates, when it appeared that the 6th candidate had really the larger number of votes,

and he claimed on this recount to be returned elected. The respondent objected that the votes cast for the other four candidates, as to whom there was no dispute, must also be recounted, but the Divisional Court (Hawkins and Channell, JJ.) held that this was unnecessary, and that the sixth candidate was entitled to be declared elected, and dismissed the appeal.

PRACTICE—SERVICE OF WRIT—DEFENDANT DOMICILED OUT OF JURISDICTION—ARGUMENT THAT WRIT MAY BE SERVED ON AGENT IN ENGLAND—ORD. IX. RR. 1, 2—(ONT. RULES, 145, 146).

In *Montgomery* v. *Liebenthal* (1898) 1 Q.B. 487, the Court of Appeal (Smith, Chitty and Collins, L.JJ.), gave their approval to *Tharsis Sulphur Co.* v. *Société Industrielle des Meteaux* (1889) 60 L. T. 924. That case had decided that it was competent for litigants to contract themselves out of the Rules as regards the mode of service of process, so long as they do not ask the Court to do something prohibited by the Rules. In the present case the defendants were domiciled or ordinarily resident in Scotland, and the contract upon which the plaintiff sued provided that service of proceedings on the defendants might be made by leaving the same at the office of the London Trade Association, and by posting a copy to the defendants' address in Scotland, which should be deemed good service, any rule of law or equity to the contrary notwithstanding. The writ was served in the manner prescribed by the contract, whereupon the defendants moved before Phillimore, J., to set the service aside, which motion he refused, and the Court of Appeal sustained his decision. The defendants relied on the *British Waggon Co.* v. *Gray* (1896) 1 Q.B. 35 (noted ante vol. 32, p. 105), but the Court of Appeal held that case to be distinguishable on the ground that there the parties had agreed to something which was expressly prohibited by the Rules. So that the rule on this point may be formulated thus, that it is competent for parties to contract as to the mode of service of process in any case which the Court has jurisdiction to entertain, but it is not competent for them to contract so as to give the Court jurisdiction in any case in which the Rules prohibit it from exercising jurisdiction.

ELECTION—PETITION—SCRUTINY—CLAIM OF SEAT—ELECTION PETITION RULES, 1868, RR. 6, 7—(DOMINION ELECTION RULES 6, 7).

Furness v. *Beresford* (1898) 1 Q.B. 495, was an election petition in which the petitioner, the unsuccessful candidate, claimed to have a scrutiny, alleging that he was entitled to the seat as having had a majority of lawful votes. The respondent applied for particulars under Election Rule 6 (see Dominion Election Rule 6), and an order was made in Chambers therefor, but on the appeal of the petitioner this order was set aside, the Court of Appeal (Smith, Chitty and Collins, L.JJ.) being of opinion that Rule 6 did not apply in such a case, but that Rule 7 (see Dom. Elect. Rule 7) was exclusively applicable thereto, notwithstanding there was an allegation in the petition that certain persons were guilty of corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring at the election, and that the votes of such persons ought to be struck off the poll.

SOLICITOR—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—SOLICITORS' ACT, 1860 (23 & 24 VICT., C. 127) S. 28—ONT. RULE 1129.

In re Humphreys (1898) 1 Q.B. 520, throws light on the construction to be placed on the new Ont. Rule 1129, which embodies in substance the provisions of the Imp. Stat. 23 & 24 Vict. 127, s. 28. That section empowers the Court to make a charging order in favour of a solicitor for the amount of his costs on the property recovered or preserved. The English Act does not contain the words "through the instrumentality of the solicitor," which are found in Ont. Rule 1129, but they probably add nothing to the force of the Rule. In this case the solicitors acting on behalf of the trustees of a bankrupt's estate were instructed to take proceedings for the arrest of the bankrupt for offences against the Debtors' Act, 1869, and he was arrested in Australia, whither he had gone with the proceeds of the sale of his stock in trade. On his arrest a sum of money, the proceeds of the sale, were found upon him, and was taken possession of by the Australian police, and under a power of attorney prepared by the solicitors, this money was handed over by the police and transmitted to the solicitors for the trustee in bankruptcy. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) agreed

with the Divisional Court (Wright and Kennedy, JJ.) in holding that the money in question was not money recovered or preserved in any civil suit or proceeding, and therefore not properly the subject of a charging order. Further that the power to grant such orders is discretionary, and that such discretion should be rarely exercised in bankruptcy proceedings.

PRINCIPAL AND AGENT—HOLDING OUT PERSON AS HAVING AUTHORITY AS AGENT—EVIDENCE FOR JURY—JUDGMENT CONTRARY TO FINDING OF JURY.

Spooner v. *Browning* (1898) 1 Q.B. 528, is a case in which the judge at a trial submitted certain questions to the jury, to which they returned answers which would have entitled the plaintiff to judgment, but the judge, on further consideration, being of opinion that there was no evidence for the jury on one of the questions, rejected the findings on that question, and entered judgment for the defendants. The action was brought to make the defendants liable for the frauds of a clerk in their employ, under the following circumstances. The defendants were stockbrokers, and the clerk in question was employed at a small salary, and he was also allowed by the plaintiffs a commission on all business introduced by him and accepted by the plaintiffs, but he was not authorized to accept orders on their behalf. On three occasions the plaintiffs gave orders to the clerk for the purchase of shares on the plaintiffs' behalf, which orders were transmitted by the clerk to the defendants and executed by them, and they sent bought notes to the plaintiff in respect of the shares so purchased, and the price of the first two lots of shares the plaintiff paid, by cheque delivered to the clerk, but drawn payable to the defendants' order; for the third lot he gave a cheque also to the clerk, but payable to the clerk's own order. The defendants received all of these cheques and credited the plaintiff with the amount of them. Subsequently further orders for the purchase of shares were given by the plaintiff to the clerk, who did not transmit them to the defendants, but made out and handed to the plaintiff bought notes purporting to show purchase of shares in pursuance of the orders, and to be signed by the defendants, which were in fact forgeries. For these supposed purchases

the plaintiff gave the clerk cheques payable to his own order, the proceeds of which he misapplied to his own use. The jury on this evidence found (1) that the clerk had no express authority to receive orders for the defendants, but (2) that the defendants had held him out to the plaintiff as having such authority. On the latter point, however, the majority of the Court of Appeal (Smith and Chitty. L.JJ.) held that the judge at the trial was right in holding that there was no evidence to support such a finding. Collins, L.J., was, however, unable to agree with the rest of the Court, and was of opinion that there was some evidence that the defendants by their conduct represented or permitted the clerk to represent, that orders received by him would be executed by the defendants unless they gave notice to the contrary. He also thought there was evidence of the defendants having held the clerk out as having authority to receive payments by cheque payable to his own order.

CRIMINAL LAW—MALICIOUS INJURY TO PROPERTY—ACT DONE IN ASSERTION OF RIGHT—EXCESS OF DAMAGE.

In *The Queen* v. *Clemens* (1898) 1 Q.B. 556, the Court for Crown cases reserved (Russell, C.J., and Grantham, Wright, Bigham and Darling, JJ.), lay down that the proper direction to be given to a jury on an indictment for malicious injury to property where it is claimed by the defendant that the act was done in the assertion of a right, is: Did the defendants do what they did in exercise of a supposed right? And if they did, but on the facts before them the jury are of opinion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the alleged right, then that the jury ought to find them guilty of malicious damage. In this case two wooden structures were erected on a piece of meadow land on the sea shore, over which the defendants claimed to have certain rights of user for recreation and for mending and drying nets, etc., and the defendants in the assertion of these rights pulled down the buildings and threw them into the sea. The Court thought that this was an excess of damage for which they might properly be convicted.

SHIP—CARRIAGE OF BULLION—BILL OF LADING—IMPLIED WARRANTY.

Queensland National Bank v. *Peninsular and Oriental S.S. Co.* (1898) 1 Q.B. 557, was an action brought against a steamship company to recover damages for the non-delivery of bullion entrusted to them for carriage from Australia to England. The bill of lading was subject to exceptions of "Robbers or thieves by sea or land, loss by thefts or robberies by sea or land, and whether by persons directly or indirectly in the employment or service of the company, or otherwise," etc., etc.; and the question presented to the Court for adjudication was whether there was any implied warranty in the bill of lading that the bullion room in the ship was reasonably fit to resist thieves, and whether if such warranty was broken the exceptions apply. On these points Mathew, J., gave judgment in favour of the plaintiff, and the Court of Appeal (Smith, Chitty and Collins, JJ.), unanimously affirmed his decision. The contract being for the carriage of bullion, which was to be carried in a room specially intended for that class of freight, the Court of Appeal held that there was an implied warranty that that room was reasonably fit to resist thieves, following in this respect *The Maori King* v. *Hughes* (1895), 2 Q.B. 550, and other cases where such an implied warranty of the fitness of the vessel in respect of other kinds of freight has been held to exist.

Correspondence.

ABSURDITIES IN THE CANADA TEMPERANCE ACT.

To the Editor of the Canada Law Journal.

SIR,—In the Province of Nova Scotia, under the Canada Temperance Act, offenders are tried before a stipendiary magistrate, two justices of the peace or other persons mentioned in the Act. As my objection refers only to cases tried before a stipendiary magistrate or two justices of the peace, I will content myself by referring to them. As matters stand now, if a case is tried before two justices of the peace an appeal lies to the County Court; if the case is tried before the stipendiary magistrate then no appeal lies. Now it

might be contended that the cause of this is that legal gentlemen hold the positions of stipendiary magistrates, hence the appeal being taken away. Even if this were true I would not for one moment admit that the right of appeal should not exist. But it is not correct that "gentlemen of the robe" hold the positions of stipendiary magistrates. In fact in the municipalities the reverse is generally the case. By the Towns' Incorporation Act lawyers are appointed recorders, and these gentlemen frequently hold both offices, recorder and stipendiary magistrate, but not always. I have said if the case is tried before a stipendiary magistrate there is no appeal, but the reverse if the case is tried before two justices. Now suppose the case is tried before two magistrates, one of whom is a stipendiary and the other just an ordinary justice, then an appeal lies. Certainly it appears absurd on the face of it that if an information is heard before the stipendiary alone, no appeal, but if before the stipendiary sitting as an ordinary justice, but none the less a stipendiary, and another justice, then the party aggrieved has his appeal. Looking at this matter from a reasonable standpoint the position is absurd and the Act should be so amended that an appeal would lie in any case.

As matters stand now the prosecuting officer can lay his information before a favourable stipendiary, and on very weak evidence obtain a conviction, and the defendant is really without remedy. If any legal questions are to be taken advantage of, the defendant, at great expense, has to apply to a Judge of the Supreme Court for a writ of certiorari, and, assuming it is granted, by this time the prosecutor has found out, or possibly knew from the start, he had no right to a conviction, and does not oppose the same being quashed, the result of which is that while the defendant succeeds in quashing a conviction which should never have been entered against him, he does so at his own expense, the costs amounting to as much, if not more, than if he had paid the penalty in the first instance. This is not fair and is one-sided legislation of the worst kind. Amend the Act by giving appeal in all cases, and providing that costs shall abide the result of the case, opposed or unopposed, and fair play will be shown on both sides. As the law on the matter stands now great injustice can be, and often is, done to innocent parties who have not the necessary means to pay for expensive litigation to get their rights protected.

FAIR PLAY.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

HOGABOOM *v.* RECEIVER-GENERAL.

Ontario] IN RE CENTRAL BANK. [Dec. 9, 1897.

Winding-up Act—Moneys paid out of Court—Order made by inadvertence—Jurisdiction to compel repayment—R.S.C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General—55 & 56 Vict., c. 28, s. 2—Statute, construction of.

The liquidators of an insolvent bank passed their final accounts and paid balance, remaining in their hands, into Court. It appeared that by orders issued either through error or by inadvertence, the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel repayment into Court of the moneys improperly paid out. Appeal dismissed with costs.

S. H. Blake, Q.C., and *W. R. Smythe*, for the appellants. *Newcombe*, Q.C., and *F. E. Hodgins*, for the Receiver-General. *McCarthy*, Q.C., for the respondent Holmested.

Ontario.] BURNS & LEWIS *v.* WILSON. [Dec. 9, 1897.

Insolvency —Fraudulent preference—Chattel mortgage—Advances of money—Solicitor's knowledge of circumstances—R.S.O. (1887) c. 124—54 Vict., c. 20 (Ont.)—58 Vict., c. 23 (Ont.).

In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock in trade in favour of a money-lender by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as in escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences, and to bring the case within the ruling in *Gibbons* v. *Wilson*, 17 Ont. App. R. 1.

Held, that all the circumstances necessarily known to the solicitor in th transaction of the business, must be assumed to have been known to th mortgagee, and the whole affair considered as one transaction contrived evade the consequences of illegally preferring a particular creditor over othe and that, under the circumstances, the advance made was not a *bona fi* payment of money within the meaning of the statutory exceptions. Appe allowed with costs.

Gibbons, Q.C., for the appellants. *Ritchie*, Q.C., for the respondei Wilson. *John J. Scott*, for the respondents, the W. E. Sanford Man. Co.

Ontario.] SMALL *v.* THOMPSON. [Dec. 9, 189

Mortgage—Married women—Implied contract—Disclaimer.

Where a deed of lands to a married woman, but which she did not sig contained a recital that as part of the consideration the grantee shou assume and pay off a mortgage debt thereon and a covenant to the same effe with the vendor, his executors, administrators and assigns, and she took po session of the lands and enjoyed the same and the benefits thereunder witho disclaiming or taking steps to free herself from the burthen of the title, it mu be considered that in assenting to take under the deed she bound herself the performance of the obligations therein stated to have been undertaken her behalf, and an assignee of the covenant could enforce it against h separate estate. Appeal allowed with costs.

Armour, Q.C., for the appellant. *Aylesworth*, Q.C., for the respondent

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Ontario.] MALONEY *v.* CAMPBELL. [Dec. 9, 189

Conveyance subject to mortgage—Obligation to indemnify—Assignment of Principal and surety—Implied contract.

The obligation of a purchaser of mortgaged lands to indemnify h grantor against the personal covenant for payment may be assigned ev before the institution of an action for the recovery of the mortgaged debt, an if assigned to a person entitled to recover the debt, it gives the assignee direct right of action against the person liable to pay the same. Appeal d missed with costs.

C. H. Ritchie, Q.C. (*Boland* with him), for the appellant. *McPhers* and *Clark*, for the respondent.

Ontario.] BANK OF HAMILTON *v.* HALSTEAD. [Dec. 9, 189

Banking—Collateral security—R.S.C. c. 120, Schedule "C"—53 Vict., c. ss. 74, 75—Renewals—Assignments.

An assignment made in the form "C" to the "Bank Act" as security a bill or note given in renewal of a past due bill or note, is not valid as security under the seventy-fourth section of the "Bank Act."

The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 1 affirmed. Appeal dismissed with costs.

John J. Scott, for appellant. *Gibbons*, Q.C., and *Henderson* for responde

Ontario.] WASHINGTON *v.* GRAND TRUNK R. W. CO. [Dec. 9, 1897.

Railway—51 Vict., c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.

The proviso of the fourth sub-section of section 262 of "The Railway Act," 51 Vict., c. 29 (D.), does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committee of the Privy Council to dispense with the fillings in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months. Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed. Appeal allowed with costs.

Staunton, for the appellant. *McCarthy*, Q.C., for the respondents.

Quebec.] PERRAULT *v* GAUTHIER. [Feb. 16.

Trade union—Combination in restraint of trade—Strikes—Social pressure.

Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Appeal dismissed with costs.

Lafleur and *Lanctot*, for appellant. *Geoffrion*, Q.C., for respondent.

Quebec.] MACDONALD *v.* GALIVAN. [Feb. 26.

Appeal — Jurisdiction — Appealable amount — Monthly allowance—Future rights—"Other matters and things"—R.S.C. c. 135, s. 29 (b)—56 Vict., c. 29 (D.)—Established jurisprudence in Court appealed from.

In an action *en declaration de ptaernite* the plaintiff claimed an allowance of $15 per month until the child (then a minor aged four years and nine months) should attain the age of ten years, and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The Court below, following the decision in *Lizotte* v. *Descheneau*, 6 Legal News, 107, held that under ordinary circumstances, such an allowance would cease at the age of fourteen years.

Held, that the demande must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that apart from the contingent character of the claim the demande was for less than the sum or value of two thousand dollars, and consequently the case was not appealable under the provisions of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and that, even if an amount or value of more than two thousand dollars might become involved under certain contingencies as a consequence of the judgment of the Court below, no appeal would lie. *Rodier* v. *Lapierre*, 21 S.C.R. 69, followed.

Held, also, that the nature of the action and demande did not bring the

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case within the exception as to "future rights" mentioned in the section of the Act above referred to. *O'Dell* v. *Gregory*, 24 S.C.R. 661, followed. Appeal quashed with costs.

A. R. Hall and *Smith*, for the motion. *St. Pierre*, Q C., contra.

Ontario.] BALDERSON *v.* THE QUEEN. [March 8.

Statute, construction of—Civil Service—Superannuation—R.S.C. c. 18—Abolition of office—Discretionary power—Jurisdiction.

Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act, R.S.C. c. 18, have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority. Appeal dismissed with costs.

Hogg, Q.C., for the appellant. *Newcombe*, Q.C., for the respondent.

Ontario.] DRESCHEL *v.* AUER INCANDESCENT LIGHT CO. [March 14.

Appeal—Jurisdiction—Amount in controversy—Affidavits—Exchequer Court Acts, 50 & 51 Vict., c. 16, ss. 51-53 (D.) 54 & 55 Vict., c. 26, s. 8—Patent Act, R.S.C. c. 61, s. 36.

On a motion to quash an appeal where the respondents filed affidavits that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. Motion refused with costs.

Duclos for motion. *Sinclair*, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Street, J.] [March 29.

CORPORATION OF CORNWALL *v.* CORNWALL WATERWORKS COMPANY.

Waterworks—Town taking over same—Arbitration to determine value—Necessary parties—Mortgagees.

The omission to serve notice on the mortgagees of a waterworks company, of arbitration proceedings under R.S.O, 1887, c. 164, to determine the amount to be paid by a town for such works and property, and their not being parties, and in which the award made was less than the amount of their claim, does not entitle the company to have such award referred back, and the mort-

gagees made parties ; but the rights of such mortgagees could not be affected thereby.

Aylesworth, Q.C., and *Cline*, for Company. *Leitch*, Q.C., and *E. D. Armour*, for town. *Bruce*, Q.C., for certain mortgagees.

Street, J.] GIVENS *v.* COUSINS. [April 2.

Vendor and purchaser—Security for payment of purchase money—Portion of purchase money realized under security—Judgment recovered against purchasers for balance—Agreement—Right to rescind.

Where a vendor under a contract for sale, sold certain lands to a purchaser, who, on the day named for payment of the purchase money, paid a portion thereof, giving security for the payment of the balance at a later date, when, having failed then to make payment, the vendor realized on the security, which, however, left a balance still due, for which the vendor recovered judgment against the purchaser on his promise to pay under the contract, and afterwards notified the purchaser that unless the amount was paid by a day his right under the contract and his interest in the land would be forfeited, time being declared to be the essence thereof.

Held, that the recovery of the judgment did not affect the right of the vendor to terminate the contract, nor was it a condition precedent to cancellation that the plaintiffs should return the payments they had received.

John Greer, for plaintiffs. *W. H. Blake*, for defendant.

MacMahon, J.] WELLER *v.* CARNEW. [April 2.

Landlord and tenant—Lease—Habendum for one year—Subsequent clause for notice to terminate—Repugnance.

In a lease with habendum for a year, there was inserted, after the covenant for quiet enjoyment, a clause that it was agreed that either party might terminate the lease at the end of the year, on giving three months' notice prior thereto.

Held, that the clause was repugnant to the habendum, and must be rejected, and that the lease terminated at the end of the year without any notice.

Northrop, for plaintiff. *E. Gus Porter*, for defendant.

Armour, C.J., Falconbridge J., Street, J. [April 5.

CUNNINGTON *v.* PETERSON.

Bills of exchange and promissory notes—Addition of maker's name—Alteration not apparent—Holder in due course—Bills of Exchange Act, 1890—58 Vict., c. 33, sec. 63 (D).

In an action on a promissory note signed by several parties it was shown that the name of one of the alleged makers was not signed by him or with his authority, but was added to the note after others had signed it, although before the note came to the hands of the plaintiff, a holder for value,

Held, that the plaintiff being the holder of the note in due course, and the alteration not being apparent he could avail himself of it as if it had not been altered under the proviso to s. 63 of the Bills of Exchange Act, 1890, 58 Vict., c. 33 (D.): *Reid* v. *Humphrey* (1881) 6 A.R. 403, distinguished.

W. M. Douglas, for the appeal. *E. G. Graham*, contra.

Boyd, C.] IN RE TOWNSHIP OF HAMILTON SCHOOL SECTION. [April 12.

Public Schools—School section—Appeal from Township to County Council—"Alteration"—R.S.O., 1897, c. 292, s. 39.

The amendment of the Public School Act made by 54 Vict., c. 55, s. 82 (R.S.O., 1897, c. 292, s. 39), has limited the right of appeal to the County Council against neglect or refusal of a township council to employ, with applications of trustees or ratepayers, for the formation, division, union or alteration of a school section or school sections. It is now only when the neglect or refusal is a neglect or refusal to "alter" the boundaries of the section or sections that there is such an appeal; and there is no appeal where the neglect or refusal is to form, divide, or unite.

An "alteration" means some change of the course of lines delimiting the territorial area of the section or sections, leaving it in other respects intact; and not a division of one section into two, which changes the thing itself.

Clute, Q.C., for the Township of Hamilton. *W. R. Riddell* for certain ratepayers.

Boyd, C., Ferguson, J.] HUNTER *v.* TOWN OF STRATHROY. [April 16.

Costs—Summary disposal of, in Chambers—Jurisdiction—Absence of consent—Object of action not attained.

The plaintiff claimed in this action damages for injury to person and property by the alleged negligence of the defendants in having a foul drain in front of his property, and an injunction. The defendants denied the plaintiff's allegations, and alleged that if the plaintiff had suffered any injury it was by his own negligence. Before trial of the action, the defendants opened and inspected the drain and did some work upon it. The plaintiff professing to regard this as a compliance with his demand, asked the defendants to consent to the costs being disposed of by order in Chambers, to which the defendants answered that the work was being done in the ordinary course of municipal work, without the intention of admitting any liability, and refused to consent. The plaintiff moved in Chambers, without consent and against the objection of the defendants, and obtained an order for payment by the defendants of the costs of the action.

Held, that under these circumstances, there was no jurisdiction to summarily dispose of the costs in Chambers, the object of the action not having been substantially attained. *Knickerbocker* v. *Ratz*, 16 P.R. 191, distinguished.

Osler, Q.C., and *D. L. McCarthy*, for defendants. *W. H. Blake*, for plaintiff.

Armour, C.J.] CLANVILLE *v.* STRACHAN. [April 28.

Bankruptcy and insolvency—Insolvent debtor—Ranking on estate—Valuing security—Party primarily liable—R.S.O. c. 147, s. 20—Construction of.

By s. 20 of the Assignment Act. R.S.O. c. 147, it is provided that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon."

Held, that this means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security. It matters not if, according to the form of the transaction, the debtor and the third party are both apparently primarily liable to the creditor; if, as between themselves, the third party is primarily liable and the debtor only secondarily liable, the creditor must put a specified value upon his security, for in such case the third party is the party "for whom the debtor is only secondarily liable." The form of the transaction is not to be looked at, but the substance of it, in order to ascertain whether the third party is the party primarily liable for the claim; and if it be found that he is, the debtor is then only secondarily liable for the claim within the meaning of the provision. The reason and object of the provision was to prevent the estate of a debtor being burdened by claims for which the debtor was only secondarily liable to a greater extent than was necessary for the protection of a creditor, and to augment his estate as much as possible.

In re Turner, 19 Ch. D. 105, referred to.

Shepley, Q.C., for plaintiff. *Worrell*, Q.C., for defendants.

Ferguson, J., Robertson, J., Meredith, J.] [May 2.

WRIGHT *v.* CALVERT.

Costs—Set-off—Interlocutory costs—Rules 1164, 1165—Discretion of taxing officer—Appeal.

An appeal by the defendant Calvert from an order of Rose, J., in Chambers, allowing an appeal from the ruling of one of the taxing officers at Toronto, and directing a set-off of certain costs awarded to the appellant against the amount of the plaintiff's judgment debt and costs, notwithstanding the assertion of a lien by the solicitor for the appellant.

The plaintiff had recovered judgment in the High Court against two defendants for debt and costs. The plaintiff, after examining the defendant Calvert as a judgment debtor, made a motion for a receiver, which was dismissed without costs, and a motion to commit the defendant Calvert for refusal to answer and for making unsatisfactory answers upon his examination, which was also dismissed without costs. The plaintiff appealed to a Divisional Court, by one appeal, from the orders dismissing these motions, and his appeal was dismissed with costs.

On taxation of the costs of this appeal, the taxing officer was asked to set

them off against the plaintiff's judgment debt and costs, but the defendant, Calvert's solicitor, asserting a lien on the costs awarded to him, the taxing officer refused to make the set-off.

The motion to ROSE, J., was by way of appeal from the taxing officer's ruling, and also a substantive motion for an order directing a set-off.

Rule 1164 provides that "where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may delay the allowance of the costs such party is entitled to receive, until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. Rule 1165: "A set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but interlocutory costs in the same action awarded to the adverse party may be deducted."

H. T. Beck, for the defendant Calvert, contended that the costs awarded him were not interlocutory costs, and, even if they were, the granting of a set-off was in the discretion of the taxing officer, and no appeal from such discretion lay to a Judge in Chambers or other tribunal.

Clute, Q.C., for the plaintiff.

Held, that the costs were interlocutory costs, and a set-off was properly directed by the Judge in Chambers, to whom an appeal lay from the taxing officer's ruling.

Appeal dismissed with costs, to be fixed by the Registrar.

Armour, C.J., Falconbridge, J., Street, J. [May 4.

BANK OF TORONTO *v.* KEYSTONE FIRE INS. CO.

Trial—Jury notice—Striking out—Duty of Judge presiding at jury sittings—Transfer to non-jury list.

An appeal by the defendants from an order of MEREDITH, C.J., made when presiding at the Toronto Jury sittings, striking out the jury notice served by the defendants, and transferring the action for trial to the Toronto non-jury sittings, was allowed, STREET, J., dissenting, and the case was ordered to be reinstated on the list of actions for trial with a jury, and the jury notice restored; but this not to interfere with the right of the Judge presiding at the trial to direct that the action should be tried without a jury; and the costs to be costs in the cause.

Per ARMOUR, C.J.—The Chief Justice of the Common Pleas was not the Judge presiding at the trial of the action within the meaning of s. 110 of the Judicature Act, for he declared as soon as it was called that he would not try it, and then ceased to have any power over it. Nor could the order be supported as one made in Chambers under s. 44 of the Judicature Act, for the order, as issued by the plaintiffs, did not profess to have been made in Chambers, nor did the Chief Justice in making it profess to make it as a Judge sitting in Chambers, nor was any foundation laid for it as for an order in

Chambers, but the order was made by the Chief Justice, sua sponte: see *Bull* v. *North British Canadian L. & I. Co.*, 11 P.R. 83. The duty of a Judge presiding at the trial of a cause in which a notice for jury has been given, when he directs that it be tried without a jury, is to proceed at once with the trial of it. The litigants are entitled to have their cause tried in its order upon the docket, and they are the only persons whose convenience ought to be consulted, and neither the convenience of the Judge holding the sittings, nor of the jury, nor of the counsel, should be allowed to stand in the way of their right to have their cause tried in its order upon the docket.

Per STREET, J., dissenting.—The Chief Justice was not the Judge presiding at the trial, but he had the power, sitting as a Judge in Chambers to strike out the jury notices and transfer the cause to the non-jury list upon good reason being shown for not proceeding with the trial at once. The case was one in which it was proper to strike out the jury notice, but when it was struck out it did not follow that the case should be transferred to a non-jury list, but the contrary. The case, however, having been transferred to the non-jury list, should remain there, and the appeal be dismissed.

McCarthy, Q.C., and *L. G. McCarthy*, for defendants. *S. H. Blake*, Q.C., and *R. McKay*, for plaintiffs.

Ferguson, J., Robertson, J., Meredith, J. [May 6.

IN RE MONTREAL AND OTTAWA R. W. CO. AND OGILVIE.

Appeal—Award—Railway Act—Forum—Transfer to proper Court—Rule 784.

The proper forum for the hearing of an appeal from an award under the Dominion Railway Act is a Judge in Court, and not a Divisional Court; the provision of Rule 117 respecting proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final, is not applicable to an appeal of this kind. *In re Potter and Central Counties R. W. Co.*, 16 P.R. 16, approved.

Where an appeal was brought in the wrong Court, an order was made under Rule 784 transferring it to the proper Court, upon payment of costs.

W. R. Riddell, for the company. *L. G. McCarthy*, for the claimants.

Street, J.] IN RE HICKS *v.* MILLS. [May 6.

Costs—Scale of—County Court action—Motion to change venue—Appeal.

The costs of an application to the Master in Chambers, under rule 1219, to change the place of trial in a County Court action, should be taxed on the County Court scale, but the costs of an appeal from the Master's order to a Judge in Chambers and of a further appeal to a Divisional Court should be taxed on the High Court scale.

N. F. Davidson for the plaintiff. *J. H. Moss* for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McKENZIE *v.* JACKSON. [March 8.

Assessment for school purposes—Municipal Assessment Act of 1895—Incorporation of provisions in Public Instruction Act—Amendments made subsequently—Mistrial—Secretary of school trustees not responsible for arrest of party indebted for poll tax.

Defendant C., as secretary of the school trustees made an affidavit under the Acts of 1895, c. 5, s. 54, before the defendant J., a justice of the peace, setting forth that plaintiff was indebted to the trustees in a sum of money, being the balance of a poll tax imposed for school purposes, and that a demand had been made for payment, but the money had not been paid. Upon this affidavit J. issued a general warrant, under the Assessment Act of 1895, s. 55, which was delivered to the defendant H., a constable, to execute. H. returned that he was unable to find any goods of the plaintiff, and that the amount and costs were still due. The magistrate thereupon issued a warrant, under which plaintiff was arrested, and for this arrest the action was brought. The Act in relation to public instruction, Acts of 1895, c. 1, s. 44, provided that in default of payment the amount assessed for school purposes should be collected under the "provisions of the Municipal Assessment Act of 1895." The Municipal Assessment Act (Acts of 1869, c. 5) contained no provision for imprisonment in default of payment, but by the Act to amend and consolidate the acts relating to Municipal Assessment (Acts of 1896, c. 14) such a provision was added.

Held, that the incorporation in the Public Instruction Act of 1895 of the provisions of the Municipal Assessment Act of 1895 had not the effect of incorporating also the amendments made to the latter act in the following year, there being nothing in the words used to justify the construction that the rates were to be collected under the Municipal Assessment Act as amended from time to time.

Through some inadvertence, to which the conduct of the plaintiff's solicitor contributed, the action, which was one for false imprisonment, was tried as if it were an action for malicious prosecution, and on answers of the jury to questions submitted to them judgment was entered for defendants.

Held, that there had been a mistrial, and that, except to the defendant C., the judgment entered for defendants must be set aside with costs, and a new trial ordered.

As to the defendant C., dismissing the action with costs.

Held, also hat defendant C. was not liable in any way for the acts complained of, the presumption being that he was only seeking to have the law carried out, and all that he did being consistent with that view.

H. Mellish for appellant. *W. B. A. Ritchie*, Q.C., and *J. A. Mackinnon* for respondent.

ll Court.] GARDEN *v.* NEILY. [March 8.

incipal and agent—Transfer of property by agent in excess of authority—Right of principal to recover—Costs—Detinue—Specical damage.

Plaintiff placed a mare in the custody of B. for sale with permission to ke use of her pending the finding of a purchaser.

Held, 1. B. was not justified in parting with the property otherwise than authorized, and that plaintiff was entitled to recover against defendant, o, by pressure, induced B. to make use of the property so entrusted to him the payment of his own debt.

2. The trial Judge was right in assessing damages for the detention of mare as well as for the value.

3. The action on plaintiff's part being for the enforcement of a legal ht, and there being no omission or neglect on his part, that the trial Judge s wrong in depriving him of costs.

4. The discretion of the Court in relation to costs must be exercised icially, and that the fact that defendant and B. were principal and agent, d that B. acted in good faith was not sufficient reason for depriving plaintiff costs to which he was otherwise entitled.

Per MEAGHER and HENRY, JJ., MEAGHER, J., dissenting, that in detinue mages for the loss of the use of any species of personal property may be covered without an allegation of special damage.

W. E. Roscoe, Q.C., for appellant. *J. A. Fulton*, for respondent.

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wnshend, J. In Chambers. [April 28.

MURPHY *v.* MONASTERY, ETC., OF THE PRECIOUS BLOOD.

Cy-pres—Legacy—Particular purpose.

The testatrix by her last will made the following bequest: "I direct my ecutors to expend the sum of six thousand dollars towards the establishing Halifax a house of the Nuns of the Precious Blood." Under the rules of e Roman Catholic Church, to which the said community belongs, the per-ssion of the head of the diocese must first be obtained before any religious mmunity can be established in the diocese. On application by the above-entioned order, whose head house is in Quebec, to the Archbishop of alifax for permission to open a house there, the Archbishop by letter dated ebruary 9th, 1897, refused to grant permission until he could be assured that e community had such means as would make them self-supporting. The ecutors took out an originating summons asking for directions

On behalf of the residuary legatees it was contended that by reason of e inability of the nuns to obtain the permission of the Archbishop the legacy d lapsed into the residue, and that the doctrine of cy-pres did not apply: *re White's Trusts*, 33 Ch. D. 449. Counsel for the nuns contended that the quest might be applied to the uses of the order elsewhere than in Halifax, at the permission of the Archbishop was not necessary as the money was to expended only "towards" the establishment of a house in Halifax, and in y case that the bequest should remain in the hands of the executors until rther opportunity were given to the nuns to establish themselves in Halifax.

Held, that there was nothing in the bequest to indicate a general chari table purpose, and the gift having been designated for a particular specifie body the doctrine of cy-pres did not apply. The nuns have no claim for th use of the money elsewhere than in Halifax, and the permission of the Arch bishop being conditional, and there being no sufficient evidence to show tha the opening of a house in Halifax is impossible, following *Attorney-General* v *Bishop of Chester*, 1 Bro. C.C. 444, an enquiry will be directed to ascertai whether the direction of the testatrix can be carried out.

H. T. Jones, for executors. *D. McNeill* and *H. McInnis*, for residuar legatees. *J. A. Chisholm*, for the monastery.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] [Feb. 2

PERRY *v.* LIVERPOOL, LONDON AND GLOBE INSURANCE CO.

Fire insurance—Misrepresentations in application—Reversal of verdict.

The defendant company resisted payment on the grounds that plaintiff i the application on which the policy was issued represented that there was n other insurance and no encumbrance on the property, whereas in fact ther was other insurance and also a mortgage thereon. The plaintiff claimed, an the jury found, that the answer to the questions contained in the application a to there being no mortgage on the property, was written by the agent of th defendant company without the latter asking plaintiff the question, and th plaintiff signed the application without knowing that it contained the questio and answer referred to. As to other insurance the jury found that plaintiff a the time of the application bona fide believed that there was no other insu ance on the property. Also that the facts of the mortgage and other insuranc on the property were not facts material to the risks. On these findings tha trial judge directed a verdict for the plaintiff.

Held, on motion for a reversal of the verdict that the misrepresentatio complained of and contained in the application signed by the plaintiff dis charged the company of liability regardless of the findings of the jury, an that the defendant was entitled to the verdict.

W. Pugsley, Q.C., for plaintiff. *C. A. Palmer*, Q.C., for defendant.

Full Court.] LANG *v.* BROWN. [April 1

Notice of motion—When to be given to trial judge.

The notice of motion provided for in s. 366 of the Supreme Court A must be given to the trial judge before the opening of the term next followin the trial.

C. A. Palmer, Q.C., for plaintiff, in support of motion. *J. D. Phinne* Q.C., contra.

Full Court.] MACPHERSON *v.* SAMET. [April 21.

County Court action on promissory note—No particulars or formal claim of damages.

It is not necessary in an action on a promissory note in a County Court to endorse on the writ, or to serve the defendant with, particulars of the plaintiff's claim, nor is it necessary that a formal claim of damages should follow in the declaration of the setting out of the note and its presentment and non-payment.

C. E. Duffy, for appellant. *J. W. McCreedy*, for respondent.

Vanwart, J.] THE BREWERIES *v.* MCCOY. [April 22.

Defective judgment docket—If clerk's entry is right judgment will not be set aside.

The docket, which the plaintiff's attorney delivered to the clerk with the judgment roll, on which judgment was signed, did not contain the venue or the number of the roll, but both these particulars were entered in the clerk's alphabetical docket as provided by section 171 of the Supreme Court Act.

Held, that this docket is simply for the convenience and information of the clerk, so that if the latter's entry in the alphabetical docket contains the required particulars the judgment cannot be attached because of the attorney's defective docket paper.

J. D. Phinney, Q.C., for plaintiff. *W. Vanwart*, Q.C., for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.] DOUGLAS *v.* PARKER. [April 1.

County Court—Appeal from County Court—County Courts Act, s. 315, 59 Vict., c. 3, s. 2—Amount in question.

This was an appeal from the County Court of St. Norbert in a case tried by a jury before His Honour Judge Prud'homme. The plaintiff's claim was for the value of about fourteen tons of hay alleged to have been taken by the defendant. The jury at first brought in a verdict that the defendant should give fifteen tons of his own hay to the plaintiff; but, on being directed to retire and give a verdict for an amount certain, if for plaintiff, or to give a verdict for defendant, they finally brought in a verdict for defendant. This verdict was said to have been explained on the supposition that in the opinion of the jury the hay belonging to plaintiff which had been taken was of little or no value.

Held, following *Aitken* v. *Doherty*, 11 M.R. 624, that the Judge appealed to might review the evidence with the view of determining the value of the

hay in question ; that such value appeared to be certainly less than $20 ; a under s. 315 of the County Courts Act as amended by 59 Vict., c. 3, s. 2, plaintiff was not entitled to appeal ; and that the appeal should be dismis with costs.

McMeans, for plaintiff. *Elliott*, for defendant.

Bain, J.] GRAHAM *v.* BRITISH CANADIAN L. & T. CO. [Apri

Practice—Queen's Bench Act, 1895, Rules 621, 646—Time for entering app —Entry of judgment.

This was a motion to strike out an appeal by the plaintiffs against decision of the Chief Justice pronounced on the 27th November, 1897, wher he ordered that certain mortgages should be declared void, but that defenda should have a lien on the land for certain sums paid for taxes. The minute the judgment were not settled until 23rd February, 1898, and the judgm was formally entered on 24th February, in compliance with Rule 621 of Queen's Bench Act, 1895. The notice of appeal was given within two we from the date of the entry, but defendants contended that the notice sho have been given within two weeks from the date of the decision, relying Rule 646 (c) and (d).

Held, notwithstanding the apparent inconsistency between paragra (a) and (d) of Rule 646 that the two weeks should run from the date of entry of any judgment or decree required by the practice to be ente Application dismissed without costs.

Ewart, Q.C., for plaintiffs. *Mulock*, Q.C., for defendants.

Killam, J.] NICHOL *v.* GOCHER. [April

Married woman—Liability on contract—Separate estate—Separate busin

The plaintiff's claim was against a married woman for wages as a fa labourer in her employ, for money lent to and paid for her at her request, money collected by her for him, and for the price of animals sold to her. T chief point of interest arose under the defence of coverture, the plaintiff c tending that defendant carried on the business separately from her husba and relying on *Wishart* v. *McManus*, 1 M.R. 213, and *Velie* v. *Rutherfor* M.R. 168 ; and the defendant, that she did not carry on the business separat from her husband and was therefore not liable.

The plaintiff was employed as the defendant's servant, and it was und stood between them and defendant's husband that the farm was hers, and t the farming operations were being carried on as hers. The negotiations the employment of the plaintiff were conducted by the husband, though pa in the defendant's presence ; and it was the husband who was consulted by plaintiff in all matters of importance relating to the farm, though at times defendant was present.

The husband gave defendant the benefit of his advice and assistance a

also acted as book-keeper for her in a banking business carried on in her name at the same time, but it did not appear that he had any fixed salary or what was the arrangement, if any, between him and defendant.

Held, that such participation by the husband would not, in the case of an outsider contracting with the wife, absolutely prevent the finding that the business was carried on by the wife separately from her husband, and that on the evidence such finding was the proper one in this case. If, however, the defendant, on the same state of facts were claiming the profits or preceeds of the farming operations as against her husband's creditors, it would be impossible to hold it sufficiently proved that the business was bona fide intended to be that of the wife alone. It depends on the circumstances of each particular case what is the degree or nature of the participation by the husband which prevents the finding of a separate business.

Merchants' Bank v. *Carley*, 8 M.R. 258, and *Goggin* v. *Kidd*, 10 M.R. 448, distinguished. Verdict for plaintiff with costs.

Bonnar for plaintiff. *Phippen* and *Dubuc* for defendant.

Province of British Columbia.

SUPREME COURT.

McColl, J.] CALLANA *v.* GEORGE. [April 19.

Mining location—Validity of—Non-compliance with statutory requirements —Interpretation of statute.

This action was for the possession of three claims located by the plaintiffs in August, 1896. In place of putting up posts, the plaintiffs built monuments of stones and fastened the necessary notices on them. It was admitted that it would have been possible to obtain posts, as there was timber about a mile distant, and the same could have been procured and put up in one day. The Mineral Act makes no provision for stone monuments in place of posts, but the plaintiffs relied on the proviso which declares that a failure to comply with any of the requirements as to location shall not be deemed to invalidate a location if it shall appear that the locator has actually discovered mineral in place on said location, and that there has been on his part a bona fide attempt to comply with the provisions of the Act, and that the non-observance of the formalities was not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

Held, that there was not such a compliance with the statute as would entitle plaintiffs to the protection of the above proviso.

McPhillips, Q.C., *Wilson*, Q.C., and *Plunkett* for plaintiffs. *Davis*, Q.C. *Elliott* and *Duff* for defendants.

[We should like to see this case go to appeal.—ED. C.L.J.]

Book Reviews.

The Civil Code of Lower Canada, and the Bill of Exchange Act, 1890, with all statutory amendments verified, collated and indexed, by ROBERT STANLEY WEIR, D.C.L., of the Montreal Bar: Montreal, C. Theoret, Law Publisher, 11 and 13 St. James Street, 1898.

The publisher claims that this is the most accurate English edition of the Code yet published. The concordance of the Code of Civil Procedure and the Code of Napoleon, is to be found at the foot of each article. This compilation will no doubt be of great use to our professional brethren in the Province of Quebec, as well as to those in other provinces who are interested in codified law. This again brings to one's mind the wish that there might be one law for every province of this Dominion.

The Principles of Equity, by EDMUND H. T. SNELL, of the Middle Temple, Barrister-at-Law; 12th Edition, by ARCHIBALD BROWNE, M.A., of the Middle Temple, Barrister-at-Law: London, Stevens & Haynes, Law Publishers, Temple Bar, 1898

This book is stated to be "for the use of students and the profession." It is not necessary to introduce it to either one or the other in this country. Students have now, and for many years have had to study it in the Law School, or for the Bar examination, and a leader of the Bar recently remarked "I must have it, as I like to read it occasionally." The mere fact that it is in its 12th edition is sufficient evidence of its value. We scarcely join with the author in his regret that the size of the book has been materially increased. We presume his sorrow arises from a desire to keep the work within the smallest possible compass. That he has presented the subject in the most simple and condensed form in this edition as in previous ones, may be taken for granted.

Living Age.—In its issue for May 28, the *Living Age* will begin the publication of the most striking English serial of the year, "John Splendid," by Neil Munro, now in course of publication in Blackwood's Magazine. The *Living Age* has bought the right to print this story from the owners of the American copyright, and will continue its publication in weekly instalments until it is completed.

Flotsam and Jetsam.

NEGLIGENCE—OBSTRUCTION IN STREET.—A foot passenger in a city is not limited to travelling on the sidewalks or crosswalks. He may, while exercising due care in so doing, walk along or across a street, and may leave the sidewalk at such points as suits his convenience; and he has a right to presume, and act upon the presumption, that the street is reasonably safe and free from dangers to travellers for its entire width. (*Heckman* v. *Evenson* [N. Dak.], 73 N.W. Rep. 427.)

Canada Law Journal.

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We have received several communications from valued contributors on the subject of County Court Judges in Ontario, and especially in reference to the position of junior judges. Whilst we heartily sympathize with the latter in the unfair position in which they often find themselves, there is no use discussing the matter at present, as the Government would seem to be making some changes, to be referred to hereafter. The whole subject is beset with difficulties on every side. The political situation, and notably that part of it which would, if relief were given, bring in claims from the Province of Quebec, adds to the difficulties in the way of any Government attempting to deal with it as it should be dealt with. No one has yet suggested a solution of any practical value, and none occurs to us. Our judicial friends must also remember that, during the present time of depression and increasing scarcity of legal business, and the large addition to the number seeking it, the profession outside the Bench are much more concerned with their own difficulties in making two ends meet than they are with placing their brethren of the Bench in a better position as regards salaries. In fact the latter, even with their small salaries, are envied by many of those who at one time would have refused a judgeship.

CANADIAN BAR ASSOCIATION.

The Canadian Bar Association held its third annual meeting at Ottawa, on the 18th and 19th of May. The attendance was small, and entirely incommensurate with the importance of the meeting; for there can be no doubt as to the desirability of such an organization, though there may be a question

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as to its practicability, owing to the geographical difficulties to be contended with. It is clear that unless a very strenuous effort is made to render the next foregathering of the Association a success there is great danger that so far as the attendance is concerned the movement must eventually come to nought.

After the transaction of general business, Mr. O. A. Howland contributed a very able and carefully prepared paper on "Some Constitutional and International Aspects of the Cuban question." Papers were also read by Dr. Russell, Q.C., M.P., of Halifax, on the legislation of the Dominion Parliament—an instructive criticism which evoked considerable discussion among the members present, and by Mr. J. E. Farewell, Q.C., of Whitby, Ont., on "The usefulness of the office of Coroner." The election of the officers of the Association for the ensuing year resulted as follows: Honorary President, Sir Wilfrid Laurier, Q.C.; President, Æ. Irving, Q.C., Toronto; Secretary, A. Falconer, Montreal; Treasurer, C. B. Carter, Q.C., Montreal; Vice-Presidents, B. Russell, Q.C., Halifax; J. E. Robidoux, Q.C., Montreal; Senator Gowan, Barrie; G. F. Gregory, Q.C., Fredericton; D. A. McKinnon, Q.C., Charlottetown; E. V. Bodwell, Victoria; Hugh J. Macdonald, Q.C., Winnipeg; Senator J. A. Lougheed, Q.C., Calgary. At the conclusion of the meeting the visiting members of the Association were invited by the Ottawa Bar to partake of the luncheon at the Hotel Victoria on the picturesque shores of Lake Deschenes, some nine miles from Ottawa. Mr. W. D. Hogg, Q.C., occupied the chair. In response to various toasts there were short speeches from Senator Power, H. A. Powell, Q.C., M. P., H. J. Logan, M.P., N. A. Belcourt, M.P., Mr. Justice Leverqne, Judge MacTavish, Judge Mosgrove, F. H. Chrysler, Q.C., M. J. Gorman, O. A. Howland, H. O'Brien, G. F. Gregory, Q.C., D. A. McKinnon, Q.C., and others.

VENDOR'S LIEN.

An interesting branch of this subject was recently discussed in a case in the Exchequer Court of Canada.

Under the law of England and that of the United States, where lands are taken in invitum, and in the exercise of the right of eminent domain, the owner of such lands has a vendor's lien for the unpaid compensation money. In England, however, it has been held that where the statute authorizing the expropriation declares that, upon the formalities prescribed for the taking being duly executed, the lands shall absolutely vest in the person or corporation expropriating, no lien subsists in such a case (See *Wing* v. *Tottenham and Hampstead Junction Ry. Co.*, 37 L.J. Ch. at p. 655; Browne and Allan on Compensation, p. 228, et seq.). In the United States, on the other hand, the principle is established by the authorities that where the statute permits the title or right to possession to vest before the payment of the compensation money, such title or right is subject to the obligation of making just compensation, which is in the nature of a vendor's lien enforceable in equity in the usual way. (See Lewis on Eminent Domain, s. 620; *Evans* v. *Missouri, Iowa & Nebraska Ry. Co.*, 64 Mo. 453; *Dayton, Xenia & Belpre Ry. Co.*, v. *Lewton*, 20 Ohio 401).

In *Walker* v. *Ware, Hadham and Buntingford Ry. Co.*, 35 L.J. Ch. 96, where the lands had been taken under the Land Clauses Consolidation Acts by the Great Eastern Railway Company, and, before full compensation paid therefor, had passed into the hands of the defendant company, the Court declared that they were subject to the lien of the original owner, and directed a reference to settle the amount of the compensation. Lord Romily said (at p. 96) "I am of opinion that the Acts of Parliament which have been referred to do not deprive the vendor of his lien. The true construction of these Acts was never meant to be that the Company might take any lands upon paying into Court the amount of a valuation, and giving a bond, so as to deprive the vendor of his right to have the lands properly valued, or to deprive him of

his regular lien in the event of the sums paid in being deficient. . . . The vendor's lien is a right inherent in equity independently of contract. As to the public, they could have no right to use, except subject to payment." In *Munns* v. *Isle of Wight Ry. Co.*, L.R. 5 Ch. 414, Giffard, L.J., said (at p. 417): "Look at the case on principle. A railway company acquires land subject to the obligation of paying for it, and dedicates it to the public; the conditions of paying for it not being fulfilled, the land is ordered to be sold. Surely what has to be sold is the estate which the vendor had." (See also, *Cosens* v. *Bognor Ry. Co.*, L.R. 1 Ch. 594; *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, L.R. 5 Eq. 17.)

The case in the Exchequer Court was that of *Yule* v. *The Queen* (post, p. 379), and turned upon the terms of the Act of the old Province of Canada, 8 Vict., c. 90, which empowered one John Yule to build a certain bridge and to take tolls thereon for the period of fifty years, and declared that at the end of said period, the bridge, toll houses, etc., should be vested in Her Majesty, her heirs, etc., and be free for public use; and that it should then be lawful for the said John Yule, his heirs, etc., to claim and obtain from Her Majesty the full and entire value which the same should at the end of the said fifty years bear and be worth exclusive of the value of any toll or privilege. Burbidge, J., held that the language of this enactment excluded the theory of a vendor's lien in respect of the compensation money.

SOME LIQUOR LICENSE ACT ANOMALIES.

By section 57 of the Liquor License Act a person found in bar room during prohibited hours is guilty of an offence and liable on conviction to a fine or imprisonment. By section 59 person who obtains liquor at a tavern during prohibited hours renders himself liable to the like penalty; but the magistrate presiding at the trial of any complaint against license holder for selling during prohibited hours "may, having regard to the demeanor of any witness and his mode of giving his evidence, by a certificate in that behalf exempt

such witness from . . . all proceedings and penalties" under this section. Though the obtaining liquor during prohibited hours strikes one as an offence one degree more serious than the mere being found in a bar room during prohibited hours, there is no power conferred upon the magistrate to exempt a witness from the penalty prescribed for the last named offence. The anomaly is partially explained by the fact that both sections were grafted on the Act as amendments, s. 59 in 1885, and s. 57 in 1886. For some now inscrutable reason it appears to have been thought unwise, or perhaps not worth while, in the last named year to give the mere found witness the protection that had the previous year been given to the drinking witness. But for the fact that both sections were, as I am informed, enacted at the request of the temperance people, it might be suggested that the intention of the Legislature in 1886 was to encourage persons being in bar rooms during prohibited hours to convert themselves with as little delay as possible into persons drinking in rooms during prohibited hours, thus entitling themselves to ask the cloak of the magistrate's certificate.

Whatever the intention of the Legislature, the practical utility of the sections, except for mischief, is an exceedingly doubtful quantity. Prosecutions under them are rare. But they have an effect that was certainly not foreseen by the good people who promoted them. When a witness against a license holder charged with selling during prohibited hours is put into the box, he, at once, by reason of ss. 57, 59, becomes entitled to the protection given by s. 5 of the Evidence Act, which provides that no person shall be "compellable to answer any question tending to subject him to criminal proceedings or to subject him to prosecution for a penalty," and if he be an unwilling witness, counsel for the defence will not fail to inform him of his privilege and he will not fail to exercise it. Then the prosecution is up a tree, the only escape from which is to adjourn the case, lay an information against the witness under s. 57 or 59, force him to give evidence against himself under s. 9 of the Evidence Act, and then, having convicted him and thus destroyed his privilege, compel him to

give evidence against his friend the publican, all of which will impress the court room yokels as a beautiful exhibition of legal legerdemain and increase their respect for the mysteries of the law.

W. E. RANEY.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

CRIMINAL PROCEDURE—SUMMARY TRIAL—SUMMARY JURISDICTION ACT, 1879 (42 & 43 Vict., c. 49), s. 17, s.s. 2—(CR. CODE, s. 786).

In *The Queen* v. *Cockshott* (1898) 1 Q.B. 582, a motion was successfully made to quash a summary conviction, on the ground that before proceeding with the trial the magistrate failed to inform the prisoner of his right to be tried by a jury. After the trial had proceeded, the prisoner pleaded guilty and was convicted; but the omission to give him the notice required by the statute, 42 & 43 Vict., c. 49, s. 17, s.s. 2 (see Cr. Code, s. 786), was held by Wright and Darling, JJ., to be fatal, and the conviction was quashed, it being considered immaterial whether the prisoner did, or did not know of his right to be tried by a jury, or whether or not the Court knew before the proceedings commenced that the prisoner intended to plead guilty.

LUNATIC—MAINTENANCE OF LUNATIC—EXECUTION CREDITOR OF LUNATIC.

In the case of *In re Clarke* (1898) 1 Ch. 336, the Court of Appeal distinguished the case of *Re Winkle* (1894) 2 Ch. 519 (noted ante vol. 30, p. 684). In this case a judgment creditor of a lunatic not so found, after notice of the pendency of a summons in lunacy for the appointment of a receiver of the lunatic's estate, issued execution against the lunatic, under which the lunatic's goods were seized before the receiver was appointed. On behalf of the lunatic it was claimed that on the authority of *Re Winkle* the goods seized were first appli-

cable for the maintenance of the lunatic, notwithstanding their seizure, but the Court of Appeal (Lindley, Rigby and Williams, L.JJ.) held that the Court had no jurisdiction to deprive an execution creditor of his rights under his execution, and that the mere issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor, and that this is not effected until an order is made showing that the Crown has taken the property under its protection, and that such order cannot be made so as to have a retroactive effect as against an execution creditor of the lunatic; and that the Court had, therefore, no jurisdiction to order a sale of the goods seized for the maintenance of the lunatic in priority of the claims of the creditor. In *Re Winkle* the goods were in possession of the officer of the Court of Lunacy, the goods there were therefore under the control of the Court and withdrawn from legal process, notwithstanding a creditor had an execution in the sheriff's hands.

MORTGAGE—CONSTRUCTION—PROVISO FOR "PUNCTUAL" PAYMENT.

In *Leeds and Hanley Theatre* v. *Broadbent* (1898) 1 Ch. 343, the Court of Appeal (Lindley, Rigby, and Williams, L.JJ.) in construing a proviso in a mortgage deed providing that the principal should not be called in for three years, provided the interest should be "punctually" paid, have come to what seems to be the very reasonable conclusion, that "punctually really means "punctually," and does not admit of a delay of nine days, as Kekewich, J., held, nor indeed of any delay whatever beyond the day named for payment. A judicial attempt to make a new contract for the parties therefore failed.

MORTGAGEE OF SHARE OF TRUST FUND—RIGHT OF MORTGAGEE TO DEMAND PAYMENT OF WHOLE AMOUNT OF FUND MORTGAGED.

Hockey v. *Western* (1898) 1 Ch. 350, was an action by a mortgagee of a trust fund to compel the trustee of the fund to pay the whole amount of it to the plaintiff. The mortgagor had died intestate, and the trustees of the fund objected to paying the fund to the mortgagee except on his first rendering an account showing that there was as much due on his mort-

gage. The plaintiff contended that his receipt would be a sufficient discharge to the trustees, and that they were not entitled to investigate the accounts between the mortgagee and mortgagor. Kekewich, J., however, thought that the trustees were justified by the case of *In re Bell* (1896) 1 Ch. 1 (noted ante vol. 32, p. 146) in taking the course they had done, and on their undertaking to pay the money into Court dismissed the action, and, as the defendants had raised other defences on which they failed, without costs; and his decision was affirmed by the Court of Appeal (Lindley, Rigby, and Williams, L.JJ.), who dismissed the plaintiff's appeal with costs.

COMPANY—SALE OF UNDERTAKING—NOTICE OF EXTRAORDINARY MEETING—SUFFICIENCY OF NOTICE—ULTRA VIRES—ACTION TO SET ASIDE SALE—PARTIES.

Kaye v. *Croydon Tramways Co.* (1898) 1 Ch. 358: In this case the plaintiffs, who sued on behalf of themselves and all other shareholders of the defendant company, except those who were made defendants, claimed to restrain the defendants from carrying out an agreement for the sale of the undertaking to another company. One of the terms of the agreement in question provided that a part of the consideration for the proposed purchase should be paid to the directors and secretary of the company as a compensation for their loss of office, and in the notice calling the meeting of shareholders of the defendant company for the purpose of ratifying the agreement, no reference whatever was made to this term of the proposed agreement. Kekewich, J., granted an injunction, being of opinion that the notice of the meeting was insufficient, and that the agreement could not be validly ratified so as to be binding on dissentient shareholders. The defendants then appealed, and, after argument in the Court of Appeal, the case was ordered to stand over for the purpose of adding the proposed purchasers as defendants, and enabling the plaintiffs to claim the same relief against them as against the other defendants, which being done, the hearing of the appeal was resumed, when the Court of Appeal (Lindley, Rigby and Williams, L.JJ.) varied Keke

wich, J.'s order, by restraining the carrying out of the sale until duly sanctioned by a general meeting of the shareholders of the defendant company,—the Court of Appeal being of opinion that the proposal to pay part of the consideration to the directors and secretary was not necessarily ultra vires of the company, and one that might be adopted at a general meeting of the shareholders if due notice were given. In this respect the Court differed from Kekewich, J. A note at the end of the report states that it was arranged that in the event of the agreement being adopted at a further meeting of the company, the money payable to the directors of the selling company was to be paid into Court. Williams, L.J., expressing the opinion that if it should turn out that the money to be paid to the directors was really in the nature of a bonus to them for facilitating the sale, a majority of shareholders could not ratify such an arrangement so as to bind dissentient shareholders.

PARTNERSHIP—DISSOLUTION OF PARTNERSHIP—SALE OF BUSINESS TO PARTNER—"ASSETS"—GOODWILL—CANVASSING OLD CUSTOMERS—INJUNCTION—VENDOR AND PURCHASER.

In *Jennings* v. *Jennings* (1898) 1 Ch. 378, the plaintiff and defendant had been partners, and an action which had been previously brought by the defendant for the dissolution of the partnership had been compromised on the terms that judgment should be entered for the defendant in the present action for £1,200, and that the plaintiff in the present action should retain the "assets," the goodwill not being specifically mentioned. After this arrangement the now defendant began to canvass the former customers of the firm, and this action was brought to restrain him from so doing; and it was held by Stirling, J., that the relations of vendor and purchaser existed between the parties, and the plaintiff as purchaser of the "assets" was entitled to the goodwill, there being nothing in the agreement of compromise restricting the plaintiff's rights in regard to the assets; he therefore granted an interlocutory injunction in the terms of that in *Trego* v. *Hunt* (1896) A. C. 7, (noted ante vol. 32, p. 315.)

INTERNATIONAL LAW — FOREIGN MARRIAGE — DOMICIL OF MARRIAGE—CHANGE OF DOMICIL—MOVABLE GOODS—AFTER ACQUIRED PROPERTY—FRENCH LAW—COMMUNITY OF GOODS.

In re De Nicols, De Nicols v. *Curlier* (1898) 1 Ch. 403, though dealing with a prosaic question of law, reads a little like a romance. The case concerns the estate of a Frenchman who began business in London as the keeper of a restaurant near Regent street with a capital of £400, in the year 1863, and died in 1897, having accumulated a fortune of £600,000. The action was brought to determine what were the rights of his widow in his "movable goods." The deceased was married in 1854 in France, his wife and himself both being poor and having their domicil in France. There was no marriage settlement or contract as to property. Subsequently they took up their residence in England, where they acquired an English domicil. The deceased left a will whereby he left all his property to trustees (except certain legacies) to hold the proceeds in trust for his wife for life, and after her death upon trust for his daughter and her husband and children. The question submitted to the Court (Kekewich, J.) was this: Did the change of domicil alter the legal position of the parties to the marriage in reference to the movable goods? And this question the learned judge answered in the negative; and as, by the law of France, in the absence of any agreement to the contrary, there is a community of goods between husband and wife, he held that the widow was entitled absolutely to one-half of the movable goods.

ARBITRATION—PARTNERSHIP—AGREEMENT TO REFER—POWER TO EXPEL PARTNER—VALIDITY OF NOTICE—STAYING PROCEEDINGS—ARBITRATION ACT, 1889, (52 & 53 VICT., C. 49) S. 4—(R.S.O. C. 62, S. 6.)

In *Barnes* v. *Youngs* (1898) 1 Ch. 414, an application was made to stay the proceedings under the Arbitration Act on the ground that the parties had agreed to refer the matters in dispute to arbitration. The plaintiff and defendants were partners, and by the articles of partnership it was provided that a partner might be expelled for the commission of certain acts therein specified, and that if any question should arise whether a case had happened to justify the exercise of

the power, it should be referred to arbitration. The defendants, in assumed exercise of the power, without any previous complaint, had given the plaintiff notice of expulsion, but gave no details of the particular acts complained of. The plaintiff then commenced the action to restrain the defendants from acting on their notice, and the defendants then applied to stay all proceedings, on the ground of the agreement to refer. Romer, J., to whom the application was made, refused the motion, being of opinion that the preliminary question whether the notice had been validly given, was one more fit to be tried by the Court than an arbitrator, and that as there was a suggestion of the fraudulent exercise of the powers, the Court, in the exercise of a proper discretion, ought not to stay the proceedings. He intimated that in his opinion the notice was clearly bad, not having been preceded by any notice to the plaintiff of any complaint, and without giving him any opportunity to explain his alleged misconduct.

VENDOR AND PURCHASER—TITLE DEEDS—EXPENSE OF PROCURING TITLE DEEDS TO WHICH PURCHASER IS ENTITLED.

In re Duthy and Jesson (1898) 1 Ch. 419, Romer, J., held that in the absence of any stipulation to the contrary a vendor must bear the expense of obtaining title deeds required by the purchaser, to be handed over to him on completion, and to the custody of which he is entitled, and although such deeds are not in the vendors' possession nor referred to in the abstract. Although the English Conveyancing and Property Act, 1881, provides that the expense of procuring deeds not in the vendor's possession, for the verification of the abstract "or for any other purpose," is to be borne by the purchaser, yet the learned Judge considered that that did not affect the right of a purchaser to call for the delivery of the title deeds, even though they were not in the vendor's possession, and could not be procured by him without trouble and expense. The right of a purchaser would of course be stronger where, as in Ontario, there is no such statutory provision. This case would seem to show that a vendor who wishes to escape from the liability must provide by his conditions of sale, that the expense of procuring deeds not in

his possession, either for the purpose of proving title, or for the purpose of delivery to the purchaser on completion of the contract, shall be borne by the purchaser.

COVENANT—PRIVATE RESIDENCE—BOARDING AND LODGING HOUSE.

Hobson v. *Tulloch* (1898) 1 Ch. 424, is a decision of Romer, J., in an action to restrain the defendant from using premises contrary to a covenant whereby the defendant's predecessor in title had covenanted not to use the same otherwise than for a "private residence." The defendant was threatening to use them for the purpose of a boarding and lodging house for scholars attending a school in the neighborhood, kept by the defendant. This, it was held, would be a breach of the covenant, and the injunction was accordingly granted.

VENDOR AND PURCHASER—INTEREST ON PURCHASE MONEY—DELAY IN COMPLETION—DEFAULT OF VENDOR.

In re Woods and Lewis (1898) 1 Ch. 433, was an application made under the Vendors' and Purchasers' Act to determine the question whether the purchaser was liable for interest on his purchase money. The contract provided for the payment of interest until completion in the event of any delay whatever "other than the default of the vendor." Delay arose in remedying a defect in a deed made by a corporation to the vendor, which the purchaser objected did not appear to have been executed in accordance with the company's private Act. This, however, was held by Romer, J., not to be a delay due to "the default of the vendor."

WILL—ABSOLUTE GIFT—SUBSEQUENT GIFT OVER OF PROPERTY UNDISPOSED OF IN LEGATEES' LIFETIME.

In re Jones, Richards v. *Jones* (1898) 1 Ch. 438. A testator by his will, subject to the payment of his debts and funeral expenses, gave all his property to his wife—"for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give the same" . . . in trust

for other persons. The widow on the testator's death took possession of the estate and paid the debts and funeral expenses; and on her death a considerable portion of the estate still remained undisposed of. The question then arose whether the gift over took effect. Byrne, J., held it to be inoperative, and that the widow took absolutely, and her absolute interest was not cut down to a life interest by anything contained in the will, or by the attempted gift over on her decease.

COMPANY—WINDING UP—SURPLUS ASSETS, DISTRIBUTION OF.

In *re Driffield Gas Co.* (1898) 1 Ch. 451, Wright, J., discusses the proper method of distributing surplus assets upon a winding up of an unlimited company, and determines that it must be governed by the articles of association when they make provision therefor. In the case of the company in question the deed of settlement provided that upon a winding up, the residue, after paying debts was to be divided between the shareholders for the time being "in proportion to their respective shares." The shares were £10 each. Some had been paid in full, some partly paid, and some had been issued at a premium; and Wright, J., held that the surplus must first be applied in returning the paid up capital, and the balance must be distributed amongst all the shareholders in proportion to the nominal amount of their shares, without regard to premiums paid by any of the shareholders, or the manner in which dividends were payable, or had in fact been paid.

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REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] JERMYN *v.* TEW. [May 20.

Jurisdiction—60-61 Vict., c. 34 (D.), s. 1—Amount in dispute.

Action by an assignee for the benefit of creditors to set aside as a preference a mortgage given by one member of an insolvent firm, upon his individual real estate, within sixty days before making an assignment for the benefit of creditors. The mortgage was to secure an indebtedness by the insolvent firm, amounting to $2,200. Before the action came on for trial, the real estate comprised in the mortgage was sold to a prior mortgagee, who, after satisfying his own claim, paid the whole surplus, amounting to $270, to the appellant, Jermyn. The action was tried before the Chancellor on the 12th of April 1897, and he declared the mortgage to be void, and ordered Jermyn to pay over the $270 to the respondent Tew. On appeal to the Court of Appeal for Ontario, BURTON, C.J.O., and MACLENNAN, J.A., were of opinion that the appeal should be allowed, OSLER, J.A., and MOSS, J.A., were of opinion that it should be dismissed. The appellant thereupon appealed to the Supreme Court of Canada. Upon the application of the appellant to have the appeal allowed and the security approved under s. 46 of the Supreme Court Act objection was taken that under 60-61 Vict., c. 34 (Dom.), s. 1 (C.), no appeal lay, as the amount in controversy in the appeal did not exceed the sum of $1,000. MACLENNAN, J.A., held that under sub-sec. (f) of the same clause $270 could not be considered as the amount in controversy, and also that the title to real estate or some interest therein was in question, and that an appeal would lie under sub-sec. (a) of the same clause. The appeal was accordingly proceeded with, the appeal case was settled and printed, and factums were delivered by the appellant and respondent, and the appeal entered for hearing. Upon the appeal being called,

Nesbitt, for the respondent, objected that under the circumstances there could be no appeal.

H. Cassels, for appellant, contra.

The Court (Sir HENRY STRONG, C.J., TASCHEREAU, GWYNNE, SEDGEWICK, and KING, JJ.), unanimously allowed the objection and quashed the appeal, but, under the circumstances, with costs only as of a motion before a Judge in Chambers. The Court was of opinion that sub-sec. (f) could not affect the construction of sub-sec. (c), and that as the only possible result of the appeal would be the determination of who should receive the $270. the case was governed by sub-sec. (c), and did fall under sub-sec. (a).

EXCHEQUER COURT.

Burbidge, J.] IN RE MELCHERS AND DE KUYPER. [March 7.

Trade mark—Resemblance between—Refusal to register both—Grounds of.

The object of s. 11 of the Act respecting Trade Marks and Industrial Designs (R.S.C., c. 63), as enacted in 54-55 Vict., c. 35, is to prevent the registration of a trade mark bearing such a resemblance to one already registered as to mislead the public and render it possible that goods bearing the trade mark proposed to be registered may be sold as the goods of the owner of the registered trade mark.

2. The resemblance between the two trade marks justifying a refusal by the Minister of Agriculture in refusing to register the second trade mark, or the Court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade mark to obtain an injunction against the applicant in an action of infringement.

3. It is the duty of the Minister to refuse to register a trade mark when it is not clear that deception may not result from such registration: *Eno* v. *Dunn*, 15 App. Cas. 252; and *In re trade mark of John Dewhurst & Sons, Ltd.* (1896), 2 Ch. 137, referred to.

T. Brosseau, for applicants. *A. Ferguson*, Q C., and *C. S. Campbell*, for opposants.

Burbidge, J.] YULE *v.* THE QUEEN. [April 4.

Constitutional law—8 Vict. (P.C.), c. 90—B.N.A. Act, 1867, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver.

By the Act 8 Vict. (P.C.), c. 90, Y. was authorized at his own expense to build a toll-bridge with certain appurtenances over the River Richelieu, in the parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs etc., for the term of fifty years from the passing of the said Act; and that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth, exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the governor of the province for the time being, another by the said Y., his heirs, etc., and the third by the said two arbitrators. The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs maintained the same and collected tolls for the use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act.

Held, that upon the vesting of the bridge and its appurtenances in the Crown, the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was, within the meaning of the 111th section of "The British North America Act, 1867," a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable.

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2. That the Exchequer Court had jurisdiction under clause (d) of the 16th section of the Exchequer Court Act, in respect of a claim based upon the said obligation, it having risen under the said provision of the B.N.A. Act, 1867, which, for the purposes of construction of the said 16th section of the Exchequer Court Act, was to be considered a law of Canada.

3. That under the wording of the said Act, 8th Vict. (P.C.), c. 90, no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown.

4. Where both the Governments of Ontario or Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petiition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right praying that a fiat thereon be granted, or, in the alternative, that an arbitrator be appointed by the Crown, naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8th Vict. (P.C.), c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown.

E. Barnard, Q.C., *W. D. Hogg*, Q.C., *E. Lafleur*, for suppliants. *Solicitor-General* and *E. L. Newcombe*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Second Division.] SEYFANG *v.* MANN [Feb. 14.

Chose in action—Assignment of—Novation—Set off.

A firm of G. & P., which had contracted with defendants to supply them with a number of bicycles, was subsequently dissolved, G. retiring and S. taking his place. The notice of dissolution stated that the business would be carried on by S. & P., who would pay the indebtedness of the firm, and who were alone authorized to collect its debts, and by the agreement of dissolution the partners released each other from all liability, and it was agreed that all the claims of the firm belonged to and would be collected by S. & P. as the owners thereof. The defendants wrote the new firm notifying them of the contracts they had made with the firm before dissolution, on which they said they had a large claim for damages for non-fulfilment, and trusted the new firm had made this a consideration in the change of the firm ; that they were ready at any time to settle up their account, but must first have a settlement of their claim for damages. The plaintiffs in answer, disputed the defendants claim for damages, but not on the ground that they, plaintiffs, had not undertaken to pay the liabilities of the old firm.

Held, that what took place constituted a novation, and the defendants' were therefore entitled to claim against the plaintiffs the damages which the defendants had sustained through the breach of the contract, but that such damages must be limited to the damages arising from breaches occurring prior to the dissolution.

Aylesworth, Q.C., and *Cronyn*, for defendants. *R. D. Gamble*, and *I. F. Hellmuth*, for the respondents.

From Street, J.] MOORHOUSE *v.* KIDD. [May 5.

Principal and surety—Counter security—Right to enforce—Depreciation—Contribution.

Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value, and that the paying surety has refused to take any steps to enforce it. Judgment of STREET, J., 32 C.L.J. 680; 28 O.R. 35, affirmed.

McCarthy, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

From Boyd, C.] RICE *v.* TOWN OF WHITBY. [May 5.

Municipal corporations—Highway—Obstruction.

A house which was being moved from one part of a town to another, was allowed to stand over night upon one of the streets, without a watchman or warning light. The plaintiff's horse while being driven past the house that night took fright and the plaintiff was injured. Some of the town councillors knew that the house was to be moved and that it had been left standing upon the street for the night.

Held, assuming that the house was an obstruction to the highway, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation. Judgment of BOYD, C., 33 C.L.J. 691; 28 O.R. 598, reversed.

C. J. Holman, for appellant, the third party. *Aylesworth*, Q.C, and *Farewell*, Q.C., for the town. *W. R. Riddell*, for respondent.

From Rose, J.] MCMILLAN *v.* MUNRO. [May 5.

Registry law—Priorities—Mortgage for balance of purchase money.

The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser. The mortgage was delivered to the vendor's agent to be registered. The purchaser had obtained the cash payment from the defendant upon the security of a first mortgage upon the land in question, and this mortgage was prepared, executed and delivered before the execution and delivery of the deed, and was registered before the deed and before the mortgage to the plaintiff. Upon receiving the

deed the purchaser handed it to the defendants' agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith, and each without knowledge or notice of the other's mortgage.

Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel, and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the claim of the plaintiff for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority. *Nevitt* v. *McMurray*, 14 A.R. 126, applied. Judgment of ROSE, J., reversed.

E. H. Tiffany, for appellant. *A. C. Macdonell*, for respondent.

From Robertson, J.] WARD *v.* WILBUR. [May 5.

Vendor's lien—Performance of agreement.

A lien in the nature of a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited to cases of conveyance for a money consideration. Where therefore upon the partition of a piece of land, held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant. Judgment of ROBERTSON, J., affirmed.

J. M. Glenn and *W. Gundy*, for appellants. *J. A. Robinson*, for respondent.

From Ferguson, J.] RAINVILLE *v.* GRAND TRUNK R. W. CO. [May 5.

Railway—Fire—Negligence—Cutting down weeds.

A railway company is responsible for damages caused by fire which is started by sparks from one of their engines in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation. Judgment of FERGUSON, J., affirmed. (See 33 C.L.J. 691.)

Osler, Q.C., for appellants. *M. K. Cowan* for respondent.

From Falconbridge, J.] [May 5.

POWELL *v.* TORONTO, HAMILTON AND BUFFALO R. W. CO

Railways—Lands injuriously affected—Operation of the railway—Dominion Railway Act, 51 Vict., c. 29.

Under the Dominion Railway Act, 51 Vict., c 29, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant, and no compensation can be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so

ar as that resulted from the passing of trains. *Re Bireley and Toronto, Hamilton and Buffalo R. W. Co.*, 33 C.L.J. 473; 28 O.R. 468, considered. Judgment of FALCONBRIDGE, J., affirmed.

Robinson, Q.C., and *Chisholm*, for appellant. *Osler*, Q.C., and *D'Arcy Tate* for respondents.

From Boyd, C.] LEWIS *v.* DOERLE. [May 5.

Will—Charitable devise—Trust for benefit of citizens of the United States of African descent.

A devise of lands in Ontario by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights" is a charitable devise and void, and the fact that the trust is to be executed in a foreign country makes no difference. Judgment of BOYD, C., 33 C.L.J. 394; 28 O.R. 412, affirmed.

W. Barwick, for appellants. *W. Cassels*, Q.C., for respondent.

From Rose, J.] [May 5.

DRAKE *v.* SAULT STE. MARIE PULP AND PAPER COMPANY.

Water and watercourses — Interference with navigation — Private right of action.

The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to his fishing grounds in the lake, and was also sometimes employed by neighbors to bring to them in this sail boat supplies and provisions. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that for the whole summer access to the stream was cut off.

Held, that the plaintiff had sufficient special interest to enable him to maintain an action for damages. Judgment of ROSE, J., affirmed.

Wallace Nesbitt, for appellants. *A. C. Macdonell*, for respondents.

From Drainage Referee.] [May 5.

THACKERAY *v.* TOWNSHIP OF RALEIGH.

Drainage—Land injuriously affected—Appeal to Court of Revision—Claim for damages—Sufficiency of notice—Filing notice—Arbitration.

Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work and who is assessed for part of the cost, is not bound to appeal to the Court of Revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration or action. Whether such a claim is made by application for arbitration or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it. The provision of sub-sec. 3 of s. 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the

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County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited, but a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference because of the drain, with access to part of the claimant's farm. Judgment of the Drainage Referee affirmed.

M. Wilson, Q.C., for appellants. *W. Douglas*, Q.C., for respondent.

From Street, J.] IN RE CURRY, CURRY *v.* CURRY. [May 5.

Improvement on land—Tenant in common—Allowances—Interest—Practice—Master's office—Accounts.

A tenant in common who holds possession of and manages the common property is entitled when called on for an account by his co-tenant to his proper and reasonable expenditure for repairs and improvements with interest from the time the expenditures are made. Judgment of STREET, J., affirmed.

Where accounts are brought into the Master's office with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved. Judgment of STREET, J., 3 C.L.J. 342; 17 P.R. 379, affirmed.

McCarthy, Q.C., and *O. E. Fleming*, for appellants. *S. H. Blake*, Q.C. and *R. F. Sutherland*, for respondents.

Practice.] STAR LIFE ASSURANCE SOCIETY *v.* SOUTHGATE. [May 10

Judgment—Action on bond—8 & 9 Wm. III., c. 11—Rule 580—Procedure—Penalty—Assessment of damages—Motion for judgment—Rule 593.

In an action upon a bond conditioned for the payment of a sum of money by instalments, with interest in the meantime on the unpaid principal, by Rule 580, the provisions of 8 & 9 Wm. III., c. 11, as to the assignment or suggestion of breaches, and as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario; but in all other respects the practice and proceedings are the same as in an ordinary action, and subject to the Rules. The claim in such an action is not the subject of a special indorsement under Rules 138 and 603, but it is in the nature of a claim for damages. Upon the defendant in such an action making default in delivering a defence, judgment is to be obtained by the plaintiffs by motion under Rule 593, and should be for the penalty, and for assessment of damages for the breaches assigned or to be suggested in such way as may be thought proper under Rules 578, 579. When the action comes for assessment of damages before a Judge sitting for the trial of actions, he can do no more than assess the damages in respect of the breaches of the bond for which execution is to be issued.

Shepley, Q.C., *G. C. Campbell* and *Frank Denton*, for the appellants *Ludwig*, for respondents.

HIGH COURT OF JUSTICE.

Street, J.] TOWNSEND *v.* O'KEEFE. [April 1.

Pleading—Slander—Particulars—Names of persons—Times and places—Striking out—Amendment.

In an action of slander the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added "and to others at present unknown to the plaintiff."

Held, sufficient.

It also alleged that during a period of five months the defendant spoke and published various slanders to certain named persons and to others not known to the plaintiff.

Held, bad, and struck out; for it did not show which of the persons mentioned were present when the different statements were made, nor at what times and places they were made.

Leave to the plaintiff to amend by adding further charges within reasonable limits.

Thurston, for the plaintiff. *W. H. Lockhart Gordon*, for the defendant.

Rose, J.] SINCLAIR *v.* BROWN. [April 1.

58 Vict., c. 21 (O.)—R.S.O. (1897), c. 127, s. 12—Construction of—Widow's charge—Quantum of—Foreign estate.

Under 58 Vict., c. 21 (O.), now s. 12 of R.S.O. (1897), c. 127, the widow of an intestate who left no issue, is entitled to $1,000 out of his estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

A. F. Lobb, for the plaintiff. *Geo. W. Lount*, for the defendants.

Armour, C.J., Falconbridge, J., Street, J. [April 7.

ALDRIGH *v.* HUMPHREY AND YOUNG.

Justice of the peace—Warrant of commitment—Constable executing in adjoining county—Arrest—24 Geo. II., c. 44, s. 6—R.S.O. (1887), c. 73—Notice of action—Insufficiency of—Direction to juror—Not guilty by statute.

Plaintiff having been convicted of an assault and fined by a magistrate in the county of H., the magistrate issued a warrant for his arrest for the non-payment of the fine, directed to a constable, who went after the plaintiff and found him in an adjoining county, when he told him he had a warrant of commitment for him for his arrest, at his request allowing him to read it, when the plaintiff said he would go with him, which he did; the constable taking him before the magistrate in the county where he was convicted, where he paid the fine, costs and constable's fees.

Held, that what took place constituted an arrest.

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Semble, that if the constable had merely told the plaintiff he had a warran of commitment for him without showing it, and the plaintiff on being so tol had gone with him, it would have been an arrest.

Held, also, that the constable was not entitled to the protection of 2 Geo. II., c. 44, s. 6.

Held, also, that as the evidence showed that the constable was acting wit the bona fide intention of executing the warrant, he was entitled to the pro tection of R.S.O. (1887), c. 73, and to notice of action, but that as the notice o action given stated that the arrest took place in a township other than th correct one it was insufficient.

Held, also, that as the evidence of both the plaintiff and defendant showe where the arrest took place, the trial judge was right in telling the jury s instead of leaving to them to find as a fact.

Held, also, that the constable was entitled to plead not guilty by statut to the statement which alleged the arrest in the county where it was made.

Held, also, that if there had been any evidence to warrant it the plainti might have required the jury to be asked to find that the constable did not a in good faith in making the arrest.

W. W. Osborne, for the plaintiff. *E. D. Armour*, Q.C., contra.

Street, J.] RE GEORGIAN BAY AQUEDUCT POWER COMPANY. [April 1

Winding up order—Proof of assets—Unpaid stock—Stock issued as paid up.

A winding-up order will not be granted where there are no assets, and th petitioning creditor would therefore get nothing by the order.

Where, however, on a petition for such an order, which was contested o the ground of the alleged non-existence of assets, it appeared that there wa an amount of subscribed stock only partially paid up, an amount of stoc issued as paid up, the consideration for which did not satisfactorily appear, an also a large issue of bonds, which appeared to have been of very little bene to the company, and it was impossible to say whether they were held for valu or not, an order was granted.

Clute, Q.C., for the petitioner. *Aylesworth*, Q.C., and *Ferguson*, contra.

Boyd, C.] MORROW *v.* LANCASHIRE INSURANCE COMPANY. [April 1

Insurance—Further insurance—Double insurance—Proofs of loss.

The plaintiff insured his barn in the defendant company for $2,100, an afterwards mortgaged his farm, including the barn, to a loan company f $1,500, assigning the policy to the company as collateral security. The mor gage contained a covenant that the mortgagor would insure the buildings f not less than $1,000; but that the mortgagees might themselves insure th property without any further consent of the mortgagor. Subsequently, witho the knowledge and consent of the plaintiff, the policy was cancelled, and th mortgagees effected a new insurance in another company for the sum $600. The property having been destroyed by fire, the plaintiff notified th company thereof, whereupon they denied liability on the ground that th

policy had been cancelled, and on the plaintiff afterwards writing offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, but said nothing as to furnishing proofs of loss.

Held, that the plaintiff did not cease to be the "person insured" within the meaning of the Insurance Act, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act.

Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of sub-sec. 8, s. 168 of R.S.O. (1897), c. 203; nor could it be deemed a double insurance as understood in commercial law.

Held, also, there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss.

Geo. Wilkie, for the plaintiff. *Dalton McCarthy*, Q.C., and *C. J. McInnes*, for the defendants.

Street, J.] HEWETT *v.* JERMYN. [April 20.

Will—Construction of grant of probate to one of two executors—Right of such executor to sell—Vendor and purchaser.

A testatrix devised and bequeathed all her real and personal property to her husband H. and to R. as her executors, to carry out the provisions of the will, with full power and authority, if in their discretion they deemed it advisable, to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband H. during his lifetime, and after his death to sell the property and divide the same equally between her children. R. renounced probate, and on 20th April, 1892, probate was granted to H., who, as sole executor, had since contracted to sell to J. certain of the testatrix's lands to pay debts, etc.

Held, that H. had power to make a valid sale, and that s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power.

Holden for the petitioner. *Hamilton Cassels* contra.

Divisional Court.] REG. EX REL. HALL *v.* GOWANLOCK. [April 29.

Municipal elections—Concurrent motions in High and County Court—Prohibition—Collusion—R.S.O., 1897, c. 223, s. 227.

Appeal from order herein for prohibition, noted supra, p. 317.

There is no power in the Judge in Chambers either to prohibit or enjoin the Judge of the County Court, who has equal jurisdiction and authority with him, from proceeding with the trial of the validity of this election. The proper course would have been for the defendant to have moved in the County Court on notice, addressed to the two relators, calling on them to show cause why the motion before the County Court Judge should not be set aside or made returnable before the Master in Chambers, and upon this motion col-

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lusion in the first notice of motion could have been tried and disposed of. What was done by the County Court Judge was at most but error in procedure, and as such was not the subject for either prohibition or injunction.

Appeal allowed with costs, STREET, J., dissenting.

Du Vernet and *Woods* for the appeal. *A. H. Marsh*, Q.C., and *Lindsey*, contra.

Street, J.] IN RE SOLICITOR. [May 11.

Appeal—Consent order—Denial of consent—R.S.O. c. 51, s. 72.

An appeal by Henry S. Clarkson from an order of the local judge at Brampton. Clarkson, on the 22nd January, 1898, issued a præcipe order for the taxation of certain bills of costs delivered to him by his solicitor. The latter moved before the local Judge to set aside the order, upon the ground that one of the bills had been delivered several years before the order for taxation was made. Upon the return of this motion an order was drawn up, in the nature of a compromise, providing for the taxation of all the solicitor's bills, irrespective of any special agreements for fixed charges, and binding Clarkson not to set up the Statute of Limitations as to any of the items. This order appeared on its face to be a consent order. The appeal was on the ground that Clarkson did not consent to it. No leave to appeal was obtained from the local Judge.

Held, that the appeal could not be entertained; R.S.O. c. 51, s. 72.

T. J. Blain for the appellant. *J. H. Moss* for the solicitor.

Meredith, C.J., Rose, J., MacMahon, J. [May 11.

RONDOT *v.* MONETARY TIMES PRINTING CO.

Costs—Taxation—Depositions not used at trial—Counsel fee—Quantum—Review.

In an action for libel the defendants in support of their defence of justification obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken thereunder for use at the trial. The evidence however, was not used at the trial, owing to the plaintiff being called as a witness by the defendants, and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

Held, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against the plaintiff the costs of executing the commission, the taking of it having been, under the circumstances, not unreasonable, and the fact that it was not used not being sufficient to deprive the defendants of the costs of it.

The practice is not to interfere upon appeal with the discretion of a taxing officer as to the quantum of a counsel fee.

Swabey, for the plaintiff. *King*, Q.C., for the defendants.

Boyd, C.] IN RE BENNINGTON. [May 20.

Devolution of Estates Act—Executors and administrators—Power to mortgage lands—Consent of official guardian.

John Hoskin Q.C., as official guardian, applied under Rule 972 for an order or direction touching certain real estate in which infants were interested, the question being whether executors or administrators had power under s. 9 of the Devolution of Estates Act, R.S.O. c. 127, with the consent of the official guardian, to mortgage the lands in question.

THE CHANCELLOR held that the executors or administrators had such power with such consent.

Boyd, C.] NEVILLE *v.* BALLARD. [May 20.

Solicitor—Charging order—Infant plaintiff—Action for personal injuries—Lien on taxed costs.

An application by the solicitor for the infant plaintiff, under Rule 1129, for an order charging the amount of the judgment recovered by the plaintiff against the defendant with the costs incurred by the applicant as between solicitor and client.

Held, that by Rule 1129 a discretionary power is given to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court, in the exercise of its discretion, to make the charge: *Re Humphries* (1898) 1 Ch. 526. The Rule gives the solicitor an ancillary right—one not intended to displace the liability of the client to pay the solicitor out of his own pocket, but ancillary to his right to be paid on his retainer: *Groom* v. *Cheesewright* (1895) 1 Ch. 730. Here the retainer was given by the father of the infant, and the infant plaintiff was not liable to the solicitor for any of the costs. It was just that the costs taxed against the opposite party by virtue of the solicitor's exertions should be charged or impounded to answer the solicitor's lien. But beyond this, in the case of actions grounded on personal injuries to infants, the Court ought not to go.

Order made directing that the judgment should stand charged to the extent of the taxed costs in favour of the solicitor, and enjoin the infant and next friend from receiving or disposing of the same. No costs of the application.

The Chancellor subsequently refused an application by the solicitor for the plaintiff, to add to the order a direction that the charge should be enforced by the sale of the judgment.

Mulvey for the applicant. *J Hoskin*, Q.C., for the infant plaintiffs.

Boyd, C.] DAVIDSON *v.* MERRITTON WOOD AND PULP CO. [May 25.

Settlement of action—Validity of—Trial—Issue—Action—Pleading.

An assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without

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reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid.

Held, that it was not necessary to bring another action to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff, and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue. *Rees* v. *Carruthers*, 17 P.R. 51, distinguished. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O.R. 64, and *Haist* v. *Grand Trunk R. W. Co.*, 22 A.R. 504, followed.

S. B. Woods, for the applicant. *R. McKay*, for the defendants.

Province of New Brunswick.

SUPREME COURT.

Full Court.] EX PARTE MCELROY. [April 23.

Malicious destruction of fence on highway—Excessive costs.

The applicant and two other young men were convicted separately of breaking down a fence, enclosing certain school grounds. A portion of the fence so broken was on the highway, and it was sought to set aside the convictions on this ground, and also on the ground of excessive costs taxed by the convicting magistrate, the costs of the three cases aggregating upwards of $100.

Held, that inasmuch as the evidence indicated that the fence was destroyed wantonly and not in the assertion of any right as regards the highway, the conviction should not be disturbed for this reason, but the rule was made absolute for a certiorari on the ground of the excessive costs, with directions to the convicting magistrate to return an itemized statement of the same.

F. B. Carvell, for the applicant. *G. F. Gregory*, Q.C., and *J. R. Murphy* contra.

Full Court.] EX PARTE KILLAM. [April 23.

Insolvent—Orders for payment of judgment debt by instalments—Future income—Civil servant

59 Vict. c. 28, s. 53, providing for orders for the payment of judgment debts by instalments applies only to present ability to pay and does not contemplate future earnings or income that may be uncertain, LANDRY, J., dissenting.

Held, also, per TUCK, C.J., and HANINGTON, J., that civil servants and all persons in the employ of the Federal Government are, so far as their incomes as such are concerned, exempt from such orders. Rule absolute for certiorari.

J. D. Hazen, Q.C., *A. A. Stockton*, Q.C., and *D. Grant*, in support of rule. *O. S. Crocket* and *C. A. Stockton*, contra.

Full Court.] EX PARTE WOODSTOCK ELECTRIC LIGHT CO. [April 23.

Summary conviction against a corporation.

A corporation cannot be proceeded against under the Dominion Summary Convictions Act. Rule absolute for certiorari to remove conviction for not registering.

A. B. Connell, Q.C., in support of rule. *E. H. MacAlpine* and *W. Pugsley*, Q C., contra.

Full Court.] WOODSTOCK WOOLEN MILLS CO. *v.* MOORE. [April 23.

Deed—Description by plan only.

A plan or sketch inserted under the description in the body of a deed without any reference thereto by words in the deed is as much a part of the deed as if there were such reference.

A. B. Connell, Q.C., and *A. A. Stockton*, Q.C., for plaintiff. *G. F. Gregory*, Q.C., for defendant.

Full Court] LABELLE *v.* MCMILLAN. [April 23.

False imprisonment - Evidence as to offence for which imprisoned.

Plaintiff was convicted before one magistrate of violation of Liquor License Act, of 1896, and imprisoned for want of distress, from which imprisonment he was discharged on habeas corpus, on the ground that one magistrate had no jurisdiction to try offences under the Act. In an action for false imprisonment plaintiff offered evidence, which was admitted, to prove that he was not guilty of the offence for which he was thus convicted. Defendant objected on the ground that only the evidence taken before the magistrate could be used.

Held, on motion for a new trial, that the evidence was properly received.

A. A. Stockton, Q.C., and *John Montgomery*, for plaintiff. *H. F. McLatchy*, for defendant.

Full Court.] EX PARTE PASCAL HEBERT. [April 23.

Attachment for non-payment of costs—Demand by chairman of a corporate body—Not sufficient for attachment.

A demand of the payment of costs by the chairman of a board of Liquor License Commissioners, to whom the same were payable on the discharge of a rule for a mandamus to compel them to issue a license to the applicant, is not sufficient to support a motion for an attachment for their non-payment. The demand must be made by all three members of the Board, or by some one authorized by resolution to make the demand in their behalf.

Rule refused, MCLEOD, J., dissenting.

H. B. Rainsford for the application.

Full Court [EX PARTE LAWRENCE. [April 23.

Two arrests—Splitting of claims—Certiorari

The applicant, having been arrested twice on the same day on separate capiases, issued out of the city of Fredericton Civil Court at the suit of the

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same plaintiff, and having given bail in each case, sought to set aside the second arrest on the ground of the splitting of claims, and moved for a rule for certiorari to bring up the proceedings on the second arrest.

Held, that certiorari would not lie. HANINGTON, J., dubitante.

F. St. John Bliss for applicant.

Full Court.] GORMAN *v.* URQUHART. [April 23.

Slander—Certificate for costs.

In an action of slander in the Supreme Court plaintiff obtained a verdict for $120, being $60 on each of two counts for words accusing her of adultery. The Court en banc subsequently disallowed the assessment on the second count, on the ground that the occasion was privileged, and plaintiff consented to a reduction of the verdict by this amount. On an application to the trial Judge for a certificate for Supreme Court costs the latter referred the same to the Court en banc.

Held, HANINGTON and LANDRY, JJ. dissenting, that a certificate should be granted.

Wm. Wilson, in support of the application. *G. F. Gregory*, Q.C., contra.

Full Court.] EX PARTE ANDERSON. [April 23.

Canada Temperance Act—Witness not tendered with conduct money.

The applicant was summoned as a witness, and, not having attended as commanded, was fined for disobedience, and subsequently committed. No conduct money was tendered.

Held, on motion for certiorari to remove the commitment, that a witness is entitled to conduct money in all proceedings under the Summary Convictions Act, and that, the applicant in this case not having been tendered with such, the fine and commitment were unlawful.

M. G. Teed, in support of rule. *J. W. McCready*, contra.

SAINT JOHN COUNTY COURT.

Forbes, J.] BARNES *v.* WEBBER. [May 11

Disclosure—Affidavit—59 Vict., c. 28, s. 36.

On an application for disclosure under 59 Vict., c. 28, s. 36, the plaintiff's affidavit set out that a judgment had been obtained and that it was unsatisfied It was moved that the application be dismissed on the ground that the affidavi should disclose that a writ of fi. fa. had issued, to which a return of nulla bona had been made, or that the sheriff should make affidavit that he had made search, and could discover no assets available to execution. Defendant' argument was that under a bill for discovery of property in aid of an execution it had to be alleged that a return of nulla bona had been made by the sheriff, or the bill was demurrable, citing *Angell* v. *Draper*, I. Vern. 399, and that the remedy given by the Act was merely substitutionary for the remedy in

equity, and could not be had except under the like circumstances. *Ontario Bank* v. *Trowern*, 13 P.R. 422, was also referred to as an express decision upon the point. Application withdrawn, though not to be taken as assenting to the defendant's contention.

A. P. Barnhill, for the application. *W. H. Trueman*, contra.

Province of British Columbia.

SUPREME COURT.

Irving, J.] MCNERHANIE *v.* ARCHIBALD. [April 27.

Mineral Act—Free miner's license—Partnership—Effect of expiration of license.

In 1895 plaintiff and defendant entered into partnership as prospectors. In June, 1896, the defendant staked a mineral claim called the Dorothy Morton. Plaintiff claimed an interest in this by virtue of the partnership, and at the trial the jury found there was a partnership, and that it applied to the Dorothy Morton. Plaintiff had a valid free miner's certificate at the time the partnership was entered into and at the time the Dorothy Morton was staked out, but permitted it to lapse in July, 1897, renewing it in August of the same year. Defendant's counsel asked for a non-suit, relying upon ss. 9 and 84 of the Mineral Act.

Held, that the existence of an unexpired free miner's certificate is a conditional limitation (see *In re Machu*, 21 Ch. D. 838), providing for the termination of the miner's estate, or for its abridgment by operation of law. The Act declares that the defaulting person's rights and interests in or to any mineral claim shall be absolutely forfeited—that is, to the Crown—provided, however, in the case of co-ownership (s. 9) or in the case of partnership (s. 84), the failure shall not cause a forfeiture, or act as an abandonment of the claim, but the interest of the co-owner, or the partner making default, shall, ipso facto, become vested in the continuing co-owner or partner. This amounts to an absolute statutory declaration that the plaintiff forfeited to the Crown his right in the claim, and that thereupon the claim became vested in the defendant.

Macdonell, for plaintiff. *Davis*, Q.C., for defendant.

Irving, J.] IN RE TOM HONG GREW. [April 30.

Practice—Interpleader—Originating summons.

A tenant of certain property was requested severally by his landlord, by the assignee of the landlord, and by the mortgagee of the premises to pay the rent to them respectively. He thereupon took out an ordinary summons in Chambers calling upon said several parties to interplead.

Held, that the summons should have been an originating summons, and the application was dismissed.

Spencer for applicant. *Marshall* for mortgagee. *Macdonell* for assignee.

Walkem, J.] TURNER *v.* JEWEL. [May 4.

Life insurance—Benevolent society—Change of direction as to payment—Revocation—Rev. Stat. B.C., 1897. c. 13 & 104.

Interpleader issue. E. F. being a member of the Ancient Order of United Workmen, received a certificate from the order dated 23rd July, 1886, which entitled his infant daughter to payment of $2,000 at his death. He placed his daughter in 1887 under the care of the plaintiffs, J. T. and his wife, and handed the certificate to them, together with his will, on the understanding that they should maintain and educate her. E. F. died in 1897, and by his will the plaintiffs were appointed trustees and executors of his estate, and also guardians of his infant daughter with directions to collect and invest for her benefit the $2,000. E. F. shortly before his death had a new certificate issued to him upon his formally agreeing in writing that the first one should be cancelled or revoked. It was revoked, and in the fresh certificate the $2,000 originally directed to be paid to his daughter is cut down to $1,500, and the balance of $500 made payable to E. F.'s sister, since deceased, and whose personal representatives now claim it.

Associations like the present one are organized under the Benevolent Societies Act (R. S. 1897, c. 13), and their policies are subject to the provisions of the Families' Insurance Act (R. S. 1897, c. 104), by s. 8, of which a certificate may be raised by an instrument in writing attached to or indorsed on, or identifying the policy by its number or otherwise, so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or to children, or one or more of them, as beneficiaries, or a beneficiary, or sole beneficiary, although the policy is expressed or declared to be for the benefit of the wife and children alone ; he may also by his will make or alter the apportionment of the insurance money ; and an apportionment made by his will shall prevail over any other made before the date of the will. No such instrument in writing was produced in this case.

Held, that the revocation of the certificate was illegal, and the second or substituted certificate was a nullity ; and the provisions of the will in respect of the first and valid certificate apply to it. The plaintiffs, as trustees, appointed by the testator to receive and invest the money in question, are entitled to it.

R. T. Elliott, for plaintiffs. *Thornton Fell*, for defendant.

Irving, J.] IN RE MCGILLIS. [April 29.

Will—Probate—Affidavit of execution.

This was an application for probate of a will, and the affidavit used was drafted from Form 14 in Howell's Probate Practice.

Held, that the affidavit was insufficient, inasmuch as it did not state that the will was subscribed by the witnesses in the presence of the testator, but leave was given to file a sufficient affidavit, which would be considered without requiring a fresh motion.

Marshall, for the application.

Book Reviews.

Canadian Annual Digest (1897), by CHARLES H. MASTERS, Esq., Barrister-at-Law, Reporter of the Supreme Court of Canada, and CHARLES MORSE, Esq., LL.B., Barrister-at-Law, Reporter of the Exchequer Court of Canada: Toronto, 1898. Canada Law Journal Company

The second annual digest, by the authors above named. will need no recommendation with those who have tested the usefulness of the volume for 1896. To others we would say that it covers all the reported cases of the year in the Dominion and Provincial Courts, and that the arrangement of the cases are most satisfactory. The work should be found in the office of every practising lawyer. A valuable feature is the table of cases affirmed, reversed and specially considered, and there is included in the digest the cases published in the CANADA LAW JOURNAL, *Canadian Law Times*, and *La Revue de Jurisprudence*, not officially reported.

Canadian Criminal Cases (Annotated); a series of reports of criminal and quasi-criminal cases in the Courts of Canada and of the provinces thereof. Edited by W. J. TREMEEAR, of the Toronto Bar. Toronto, 1898. Canada Law Journal Company.

The first number of the above series has just been published, and a perusal of its 128 pages shows its great utility, and gives promise of the volumes of the series becoming the standard work of reference for Canadian practitioners on the branch of law to which it pertains. The annotations show great care and accuracy in their compilation, and reflect a large measure of credit upon the editor, a well known member of the Toronto Bar. The concise arrangement of the head-notes in numbered paragraphs, setting forth the points of law decided, without the repetition from the case itself of the statement of facts, is a marked improvement upon the method in vogue in many of the provinces. These reports, covering as they do the criminal decisions throughout the whole Dominion, whether officially reported or not, will be exceedingly valuable alike to judges, lawyers and magistrates, and it is hoped that this publication may assist in forwarding the ever growing movement towards the formation of a uniform Canadian jurisprudence, by collecting together the many cases which would remain practically unknown, except in the locality or province in which they arose. The typographical part of the work is of the very best.

A Treatise on the Law of Indirect and Collateral Evidence, by JOHN H. GILLETT, Judge Thirty-first Judicial Circuit of Indiana; Indianapolis and Kansas City. The Bowen-Merill Co., 1897.

The raison d'etre of this book is not very evident. The preface does not much help us; it is there claimed to be a work of original investigation, but we have no further assistance in this regard, except that it is stated that the chapter on Collateral Evidence is a contribution to a subject which has never received systematic discussion, and that it has been the author's endeavour to

put the topics of res gestæ, and the allied topic of declarations denoting subjective conditions, upon a scientific basis. This preface does not, at the start, impress the practical lawyer at all favourably, and one is rather appalled by such a sentence as the following, wherein the author compares his efforts to that of a workman who feels "as he gazes upon a noble cathedral, shimmering in beauty, a very type of spiritual aspiration, from tesselated pavement to lofty spire, that he helped to build that structure, for did not his faithful back carry mortar to the skilled workmen." The authorities cited are almost entirely from the United States Reports. To the extent that there is a collection of these under the various heads into which the matter is divided, the book will be useful in this country, but it may be doubted whether it gives to the profession that which is promised on the title page.

Flotsam and Jetsam.

A recent number of the *English Law Times* contains an instructive article under the head of "Merger of Trespass in Felony," and says the profession is frequently confronted with the question whether an action is maintainable to recover damages for an act or set of circumstances which reveal a felony in another person, who has not been brought to book for his crime, or whether the defendant can take any steps to stay such an action. The writer doubts whether there really ever existed a practical rule of law that such an action is not maintainable until the criminal has been tried. Those desiring information on this subject will find the matter fully discussed in the number of that periodical for April 2.

Payments endorsed on the back of a note before its transfer to the payee are held, in *Farmers' Bank* v. *Shippey* (Pa.), 38 L.R.A. 823, to be insufficient to destroy its negotiability. The other cases on the subject are collected in a note to this case.

The loss of a draft in the mails during transmission to a correspondent for presentment is held, in *Bank of Gilby* v. *Farnsworth* (N D.), 38 L.R.A. 843, to discharge the drawer from liability, where the payee who sent it failed for nearly six months to declare the loss, although having in its possession a report from the correspondent disclosing the fact that it had not been received.

A Swede came into a lawyer's office one day, says the Cincinnati *Enquirer*, and asked: "Is hare ben a lawyer's place?" "Yes; I'm a lawyer." "Well, Maister Lawyer, I tank I shall have a paper made." "What kind of a paper do you want?" "Well, I tank I shall have a mortgage. You see, I buy me a piece of land from Nels Petersen, and I want a mortgage on it." "Oh, no. You don't want a mortgage; what you want is a deed." "No, maister; I tank I want mortgage. You see, I buy me two pieces of land before, and I got deed for dem, and 'nother faller come along with mortgage and take the land; so I tank I better get mortgage this time."

Canada Law Journal.

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The last survival of the numerous old-time forensic evils suffered by lawyers and their clients, namely, the despotism of the Bench, is falling into "innocuous desuetude" with the passing of the present century. The demand for the betterment of judicial behaviour which began to be so ably put forward by the professional and leading lay press in England some years ago, was promptly taken up by their colonial contemporaries with the most gratifying results both to the Bar and to suitors. It is only occasionally now that we hear of some ruffian in high judicial place trying to play the role of Jeffreys; and it is very interesting to note how speedily he comes off his high horse when menaced with exposure in the public prints. It was the boast of seventeenth century reformers that even the unspeakable Jeffreys himself was not "Parliament-proof;" it is our peculiar pride to know that his modern disciples are not even "newspaper-proof." In the celebrated Yelverton case, 1893 A.C. 138, their lordships of the Privy Council dealt a staggering blow to the doctrine of constructive contempts subsisting in newspaper criticism of the judges. They there hold that where an article, published in the press, containing criticisms which might have been made the subject of proceedings for libel, was not calculated to obstruct or interfere with the course of justice or the administration of the law, it did not constitute a contempt of court. The press is not afraid of a fair trial in respect of any charge that may be preferred against it; it does object to being made the victim of spite and malevolence through a medium which defies and subverts every cardinal principle of civil liberty.

Some time ago a prominent man of letters in Englan deplored the decay of sound scholarship in the Imperial Par liament. Comparing the speeches of the members of to-da with those delivered at Westminster a century ago, one i compelled to become an encomiast of times past. In the day of Walpole and Pitt, the speeches of the leading members o both Houses were, on all vital questions, splendid contribution to the literature of their country; to-day who would ever see for cultured rhetoric, or intellectual stimulus of any kind, i the pages of Hansard—more especially since we have los Beaconsfield and Gladstone? It would be hard, for instance to imagine such an incident occurring nowadays as that whic subsisted in the classical duel between Walpole and Pulteney in 1741. Pulteney had given notice to the House that h would at a given time bring certain charges against the Firs Minister. The latter, in repudiating the threatened accusa tion, theatrically laid his hand on his breast, and said wit some emotion:

"Nil conscire sibi, nulli pallescere culpæ."

Pulteney immediately sprang to his feet and declared tha the right honourable gentleman's logic was as bad as hi Latin, and that Horace's exact words were: *Nulla pallescer culpâ*. Whereupon Walpole wagered a guinea that his quota tion was right, and Pulteney accepted the challenge subjec to the arbitrament of Mr. Hardinge, the scholarly clerk of th House. The clerk decided against Walpole, who immediatel threw the guinea to his learned adversary, who, deftly catch ing it, held it up to the House and exclaimed: "It is the onl money I have received from the Treasury for many years, an it shall be the last!" What is true of Parliament is equall true of the Bar—indeed the former must needs take its vogu from the latter, seeing that it so largely recruits its rank from the gentlemen of the long robe. The golden age o polite and philosophical learning, so far as English lawyers i the mass are concerned, began with Sir Thomas More an ended with Lord Brougham—truly a long period. There ar a few great scholars in the profession to-day, but they ar

scholars in despite of the methods under which they were bred to the Bar. There are many of the profession who say that this decadence is a mere phase of modernity which the law is passing through in common with other branches of human activity—in other words, an exploitation of the paradoxical "Art for Art's sake only" formula. But as the sole art which the average latter-day lawyer has any desire to become familiar with is the seductive art of money-getting, we profoundly suspect that his adhesion to it will wax rather than wane as the years go by. Will the mental and moral regimen of the new law schools, as at present constituted, be capable of combating this evil for the younger generation and endue them not only with sound scholarship, but also with a due sense of the august responsibilities of the legal calling? We trow not.

DOWER IN EQUITABLE ESTATES.

The Common Law as to dower was on the whole tolerably simple and easily understood, but the statutory alterations in the law which have been from time to time made in Ontario, have in some respects created difficulties which are not very easily solved.

At Common Law the right of dower only existed in regard to lands of which the husband was legally seized in fee. It did not attach therefore on any equitable estate. This was considered to be a hardship on the wife, and in the days before it was so widely considered as it is to-day, that the right of dower is altogether an anomalous right, and one which should be abolished altogether, and in lieu thereof a definite proportion of the husband's estate allotted to his widow, it was deemed advisable to extend the widow's right of dower to her husband's equitable estates. But it was thought that the Common Law rule which enabled a widow to claim dower in all the lands of which her husband had at any time during the coverture been seized, and in which she had not barred her dower, ought not to be extended to equitable estates, and so it was provided that her right to

dower therein should be confined to those to which he died entitled (4 W. 4, c. 1.) Thus as far as his equitable estates were concerned, the husband's power of disposition thereof, without the concurrence of his wife, was preserved.

But a further inroad on the Common Law was made in 1879, by 42 Vict., c. 22. It was considered then, that where a wife had a Common Law right of dower, and joined with her husband in a mortgage whereby her husband's estate, subject to such dower, became converted into an equitable one, that in such a case the wife's right to dower in the equity of redemption ought not to be at the mercy of the husband; but that the wife should be dowable out of the equity of redemption, unless she also expressly barred her dower therein, and in short, that to equitable estates of that nature, the Common Law rule should be extended, and that the dower should attach thereto, whether the husband died seized thereof or not. This was accomplished by declaring that no bar of dower in a mortgage should operate to bar dower to any greater extent than should be necessary to give full effect to the rights of the mortgagee, and by also providing that in the event of a sale of the mortgaged property under a power of sale contained in the mortgage, the wife of the mortgagor should be dowable in the surplus "to the same extent as she would have been entitled to dower in the land from which such surplus money shall be derived, had the same not been sold." These last words have been criticized, as not being a very appropriate mode of expressing the idea, possibly intended to be conveyed; and it has been said that as, according to the previous statute giving dower in equitable estates, the wife, in case her husband did not die entitled would have had no dower in the land, therefore under this section she can have no dower in the surplus, unless it is either realized in his lifetime, while he is still owner of the equity of redemption, or unless he dies entitled thereto; and it has been thought that even under this provision, if the husband parted with his equity of redemption in his lifetime his widow's right to dower in any surplus is defeated: (see per Dalton, M.C., *Re Croskery*, 16 O.R. 207) but this view appar

ently fails to give due weight to the previous restricted effect which the statute gives to a bar of dower in a mortgage, which is no longer to be absolute in its operation, but only so far as may be necessary to give due effect to the rights of the mortgage; and Boyd, C., in the same case, when giving judgment reversing the decision of Mr. Dalton said: "I cannot read these sections (now R.S.O., c. 164, ss. 7, 10), as subject to (now) R.S.O., c. 164, s. 2, which provides for dower out of equitable estates, arising only when the husband died seized. That now covers cases where the wife never had dower in the legal estate, and only by the grace of the legislature does she get it out of the equitable estate, of which her husband is possessed at the time of his death." This opinion of the learned Chancellor, as to the effect of ss. 7, 10, supra, was followed in the case of *Gardner* v. *Brown*, 19 O.R. 202, where the husband being owner of an equity of redemption in lands of which he had never been seized of the legal estate, mortgaged it, his wife joining to bar her dower, and thereafter the husband assigned his equity of redemption for the benefit of his creditors. His wife claimed an inchoate right of dower in the surplus, but MacMahon, J., held that the husband's interest in the first place being but an equitable estate it was governed by (now R.S.O., c. 164, s. 2), and that the husband having parted with it in his lifetime, his wife's dower therein could not attach. Some difference of opinion existed as to the quantum of a wife's interest as doweress where the mortgage was given to secure the purchase money of the land mortgaged, and where it was given to secure a loan (see *Pratt* v. *Brunnell*, 21 O.R. 1, and *Gemmill* v. *Nelligan*, 26 O.R. 307; but the difference of opinion on this point seems to be set at rest by 58 Vict., c. 25, s. 3 (now R.S.O. c. 164, s. 8), which seems to settle the law that where the mortgage is for purchase money, the dower is to be calculated on the surplus after payment of the mortgage, and where the mortgage is to secure a loan, the dower is to be calculated on a third of the whole value of the land. In the recent case of *Re Luckhardt*, 29 O.R. 111, the majority of the Divisional Court (Boyd, C., and Ferguson, J.) adopted the view of Boyd,

C., in *Re Croskery*, supra, as to the effect of R.S.O. c. 164, ss. 2 and 7.

That case presented some peculiar features, and may seem to some persons a somewhat rigorous application of the principle of construction adopted in *Re Croskery*. The facts in *Re Luckhardt* were as follows: Luckhardt, the husband of the woman claiming dower, agreed to purchase three lots of land from one Heinman, free from incumbrances, the lots being at the time of the agreement subject to a mortgage to Winger, which it was understood was to be paid off out of Luckhardt's purchase money. The total purchase money was to be $4,500, $1,200 of which was to be paid to Winger for the discharge of his mortgage, $1,300 was otherwise satisfied, and a mortgage was to be given by Luckhardt to Heinman for $2,000 to secure the balance of the purchase money. This arrangement was carried out as follows: Luckhardt paid Winger and got a statutory discharge of the mortgage in favor of Heinman on 26th Oct., 1894. On the same day Heinman conveyed the land to Luckhardt in fee free from all incumbrances, and Luckhardt executed a mortgage to Heinman to secure the $2,000. The discharge of mortgage and the deed and mortgage were sent to the registry office at the same time for registration, and they were respectively registered on the 29th Oct, in the following order: first, the discharge, then the deed, then the mortgage. Luckhardt and his wife subsequently executed a second mortgage, and the lands were afterwards sold under a power of sale, and a surplus remained after satisfying the two mortgages; this surplus was claimed on the one hand by a receiver appointed by way of equitable execution against the husband, and on the other by Luckhardt's wife, to answer her alleged inchoate right of dower. The majority of the Court held that the husband had never been seized of a legal estate in the land, and consequently the case came within (now R.S.O. c. 164, s. 2), and the husband having parted with his equitable interest in his lifetime could not die entitled, and therefore no dower could attach, and that therefore the husband's creditor was entitled to the fund. Robertson, J.,

in a learned and carefully considered judgment, arrived at a different conclusion, basing it on the ground that the effect of the conveyancing was virtually to vest in the husband though but momentarily a legal estate in the land, and therefore the case was within section 7. The reasoning of the other members of the Court on this point it may be observed seems to rest on the fact that the discharge of the Winger mortgage did not operate to revest the estate until its registration, whereas the deed from, and mortgage to Heinman, operated from their delivery; consequently, only an equitable title passed to Luckhardt, and the legal title which had been outstanding in Winger never passed to Luckhardt at all, but revested in Heinman after he had conveyed his equity of redemption to Luckhardt, and after the latter had reconveyed it by way of mortgage to Heinman. Robertson, J., on the other hand invokes the doctrine of estoppel, and holds that the delivery of the mortgage was by way of escrow, not to be operative until the discharge should be registered, and therefore that the several instruments took effect according to the dates of their registration.

The point under discussion is a very nice one, and assuming the law as laid down by the majority of the Court to be correct, it serves very forcibly to illustrate the necessity for conveyancers being alive to the fact that discharges of mortgages do not take effect in revesting the estate until actually registered (see R.S.O. c. 136, s. 76) "and the certificate *so registered* shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor," etc., etc., a point which may at times be very important to be borne in mind.

GEO. S. HOLMESTED.

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ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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NON-SUIT—DISCONTINUANCE—PRACTICE—ORD. XXVI. RR. 1—(ONT. RULE 430, 779.)

In *Fox* v. *The Star Newspaper Co.* (1898) 1 Q.B. 636, the Court of Appeal (Smith and Chitty, L.JJ., affirmed the decision of Russell, C.J., at the trial, to the effect that a plaintiff cannot at the trial claim as of right to be non-suited, with liberty to bring a fresh action, and that he can then only discontinue by leave of the Court, and a judgment for the defendants was consequently upheld. It may be noticed that in Ontario Rule 779 makes a judgment of nonsuit equivalent to a judgment for defendant, unless otherwise ordered, whereas the corresponding English Rule of 1875 was repealed and not re-enacted by the Rules of 1883.

BILL OF LADING—"DEFECTS LATENT ON BEGINNING OF VOYAGE OR OTHERWISE."

Waikato v. *New Zealand Co.* (1898) 1 Q.B. 645, is a decision of Bigham, J., sitting in the Commercial Court, which determines that on exception in a bill of lading of losses arising from "defects latent on beginning of voyage or otherwise," does not cover defects which were patent at the commencement of the voyage, and the contention that the words "or otherwise" covered all defects, was considered untenable.

POWER—ADVANCEMENT CLAUSE - INVALID EXECUTION OF POWER—BREACH OF TRUST—TRUSTEE.

Molyneux v. *Fletcher* (1898) 1 Q.B., 648, was an action brought by certain cestuis que trustent, claiming a declaration that their trustees had been guilty of a breach of trust in paying certain trust moneys in assumed exercise of a power. The power in question was contained in a will, and authorized the trustees "to apply in or towards the advancement in life of each child a sum not exceeding £500 on his or her presumptive share," and the trustees were to be the

sole judges of the advisability of such payment, and of the signification of the term "advancement in life." After the share of one of the children had become vested the trustees at her request advanced £250, she being then married, and her husband heavily indebted to one of the trustees of the will, and the moneys so advanced were handed to him and used by him to pay his debt to the trustee, all of which was done with the knowledge of the trustees. The action was brought by the infant children of the married woman, who were entitled in remainder to the fund on the mother's death, she being still living. The case was tried before Kennedy, J., who held that the pretended exercise of the power was not made in good faith for the advancement in life of the daughter of the testator, but really to enable her to provide her husband with money to pay his debt to the trustee, and was therefore invalid, and the payment made thereunder a breach of trust. He also intimated a strong opinion that after the daughter's interest became vested there was no power to make the advancement at all, as her share then had ceased to be " presumptive."

CERTIORARI—MANDAMUS—PRACTICE.

The Queen v. *Bowman* (1898) 1 Q.B. 663, was an application for a certiorari to bring up a license to sell liquor, granted by justices, to be quashed; and also for a mandamus to compel them to hear and determine the application for license according to law. The justices had granted the license in question upon the applicant therefor paying to them a sum of money, which they intended to apply towards the reduction of rates, or some other similar public purpose. The present applicants had appeared before the justices to oppose the application for the license. The Court (Wills and Darling, JJ.), held that the granting of the license was not a judicial act, and therefore not quashable, and the certiorari was therefore refused in deference to the case of *Reg.* v. *Sharman* (1898) 1 Q.B. 578, concerning which Wills, J., however, expresses some doubt. The Court, however, held that the act of the justices in taking money for the granting of the license, though they had acted

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in good faith, was illegal, and that therefore there had been no real hearing of the application on the merits, and the mandamus was granted as asked.

JURISDICTION—JUDGE OF INFERIOR COURT INVESTED WITH POWERS OF HIGH COURT.

In re New Par Consols (1898) 1 Q.B. 669, seems to have some bearing on a point recently discussed before the Queen's Bench Divisional Court of Ontario in *The Queen ex rel. Hall* v. *Gowanlock*. Under the English Winding-up Act it is provided that every Court having jurisdiction under that Act to wind up a company, shall have all the powers of the High Court. In the course of proceedings before a judge of a County Court under the Act he made an order of committal for disobedience of an order made by him in the winding-up proceedings. The present application was then made for a prohibition, on the ground that the provisions of certain rules of Court had not been complied with. But the Court of Appeal (Smith, Chitty and Collins, L.JJ.), held that such objections could only be raised by way of appeal, and that prohibition cannot be granted against a County Judge exercising the power of the High Court.

CONTRACT—ABANDONMENT—QUANTUM MERUIT—BUILDING ON DEFENDANT'S LAND—EVIDENCE OF NEW CONTRACT.

In *Sumpter* v. *Hedges* (1898) 1 Q.B. 673, the Court of Appeal (Smith, Chitty and Collins, L.JJ.) have followed the case of *Munro* v. *Butt* (1858) 8 E. & B. 738. The plaintiff had entered into a contract to build on the defendants' land certain buildings for a lump sum. After he had done part of the work he abandoned the contract, and the defendant thereupon completed the buildings. The action was brought for a quantum meruit, but the Court held that the action would not lie, there being no evidence of any new contract to pay for the same, and the retention of the buildings on his own land not affording any evidence from which any new contract could be presumed.

STAYING PROCEEDINGS—FRIVOLOUS ACTION.

In *Stephenson* v. *Garnett* (1898) 1 Q.B., 677, an application was made to stay the action on the ground that it was frivolous and vexatious. The facts of the case were, that the defendant had recovered a judgment in the County Court against the plaintiff for a sum of money and costs, but before the costs were taxed the defendant agreed on a representation of the poverty of the plaintiff to accept a smaller sum than that for which judgment had been given, and executed a release to the plaintiff of the judgment debt and costs. Subsequently the defendant finding the representations as to the plaintiff's poverty were false, applied to the Judge of the County Court for an order to tax his costs; and the judge after hearing evidence found that the release had been obtained by misrepresentation, and ordered that the costs should be taxed and paid, together with the balance due on the judgment. The plaintiff then brought the present action, claiming a declaration that he had been released from the judgment debt and costs, and for an injunction restraining the defendant from enforcing payment thereof; the defendant then moved to stay the action as frivolous and vexatious. It was contended on behalf of the plaintiff that the Judge of the County Court had no jurisdiction on an interlocutory application to inquire into the validity of the release, and that the defendant could only get it set aside by bringing an action for that purpose; but the Court of Appeal (Smith, Chitty and Collins, L.JJ.) held that the judge of the County Court had jurisdiction to make the order which he did, and as the question raised in the action was identical with that before the County Judge, the action was frivolous and vexatious, and should be stayed as asked.

LEASE—COVENANT—"ASSIGNS"—UNDERLESSEE.

Bryant v. *Hancock* (1898) 1 Q.B. 716, was an action to recover damages for alleged breach of a covenant in a lease of a public house, whereby the lessee covenanted with the lessor, the plaintiff, that he (the lessee), his executors, administrators or assigns, would not wilfully do or suffer anything which

might be a breach of the rules and regulations established by law for the conducting of licensed public houses, etc. The lessee assigned the term to the defendants, who underlet the premises, and the underlessee committed an offence against the license laws, which resulted in a refusal to renew the license. The simple question therefore was whether the word "assigns" in the covenant included an underlessee. Lawrance, J., held that it did, but his judgment was reversed by the Court of Appeal (Lord Halsbury, L.C., and Smith and Collins, L.JJ.) This may be good law, but it does not appear to be very good sense.

ADMINISTRATION—MISCONDUCT OF WIDOW—GRANT TO SON OF INTESTATE.

In the goods of Stevens (1898) P. 126, was an application for administration made by a son of an intestate, which was granted without citing the widow of the deceased, the estate being small, and it being shown that the widow was a woman of dissipated habits, who had eloped with another man in her husband's lifetime, and sixteen years before the application justifying security was required to be given to the extent of the widow's share in the estate.

VENDOR AND PURCHASER—CONDITIONS OF SALE—VENDOR'S RIGHT TO RESCIND—REQUISITION—UNWILLINGNESS OF VENDOR TO COMPLY WITH REQUISITIONS—DEFECTIVE TITLE.

In re Deighton & Harris (1898) 1 Ch. 458, was an application made under the Vendors' and Purchasers' Act for the purpose of determining whether under the conditions of sale, a vendor had the right to rescind. The vendor was mortgagee of leaseholds, and had contracted to sell the entire term subject to a condition empowering him to annul the sale if the purchaser should make any requisition or objection "as to title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which the vendor should be unable or unwilling to comply with. In the course of investigating the title it appeared that the vendor held by a sub-demise, the bare legal estate in which was outstanding, and he expressed himself as unable or unwilling to procure the person having the legal estate to join in the conveyance

as required by the purchaser. Kekewich, J., held that the vendor was not entitled to annul the sale, but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) were of the contrary opinion. Kekewich, J., thought the case was governed by *Bowerman* v. *Hyland*, 8 Ch., D. 588, where a vendor having only the last remaining month of a term contracted to sell the fee, and it was held that he could not under a similar condition of sale rescind; the Court of Appeal thought, however, that there is a difference between the case of a man who has no title to the estate he contracts to sell, and one who has a title which is defective.

TENDER—"HIGHEST NET MONEY TENDER"—SPECIFIC PERFORMANCE—PRACTICE—STRIKING OUT STATEMENT OF CLAIM—ORD. XXV. R. 4—(ONT RULE 261).

South Hetton Coal Co. v. *Haswell S. & C. Co.* (1898) 1 Ch. 465, was an action for specific performance, or damages for non-performance. The defendant had offered certain property for sale by tender, and had agreed to accept "the highest net money tender," other things being equal. The plaintiffs had put in a tender offering £200 more than should be offered by any other proposing purchaser. There was another tender put in for a specified sum. The defendants moved to strike out the statement of claim as disclosing no reasonable cause of action. North, J., granted the application and dismissed the action, basing his decision principally on the ground that the plaintiff's tender was not in other respects equal to that of the other tender: and the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) affirmed his decision, but Lindley, M.R., who delivered the judgment of the Court, rested the case principally on the ground that the plaintiffs' tender did not fairly answer the description of what the liquidator had bound himself to accept, viz., "the highest net money tender." As he points out, whether it was a tender at all depended altogether on some other person putting in a tender: and he held that the liquidator was not under any obligation to accept a tender so framed. He, however, also agreed that the tender in other respects was ambiguous, and that the

liqidator was justified in saying that the condition as to all other things being equal and satisfactory had not been fulfilled.

MARRIED WOMAN—SEPARATE ESTATE—WIFE ADVANCING MONEY TO PAY HUSBAND'S DEBTS—WIFE'S RIGHT TO INDEMNITY AGAINST HUSBAND—44 & 45 VICT., C. 41, S. 39—(R.S.O. C. 163, S. 9).

Paget v. *Paget* (1898) 1 Ch. 470, was a suit between husband and wife, in which the wife claimed to be indemnified by the husband in respect of certain large sums of money which had been paid out of her separate estate to satisfy debts due by her husband. An order had been obtained under 44 & 45 Vict., c. 41, s. 39 (R.S.O. c. 163, s. 9), charging the money so raised against her separate estate, notwithstanding a restraint against anticipation,—and the evidence showed that the debts thus paid had been incurred in order to maintain an extravagant mode of living, in which she participated, and that, on the application for the order above referred to, the wife had referred to the debts in question as "our debts," and the order had been made without any declaration of the right of the wife to be indemnified by her husband in respect of the advances. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) thought that Kekewich, J., had rightly dismissed the action, as the circumstances of the case afforded no ground for the equitable inference that the wife was lending the money, or had any right to be indemnified by her husband in respect thereof. The Court of Appeal, however, express the opinion that the mere silence of the order removing the restraint against anticipation, is no bar to the right of the wife to indemnity, when the circumstances of the case warrant the inference that the advance from the separate estate is by way of loan.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

TORONTO ADMIRALTY DISTRICT.

McDougall, Loc. J.] WING *v.* THE "FLORA."

Lien—None for necessaries supplied in home port.

This was a claim for articles supplied the ship as coming within the meaning of the term "necessaries," and so recoverable only under s. 5 of Admiralty Courts Act, 1861. But

Held, that as they were supplied to the owner in Detroit, the home port of the ship and where plaintiff carried on business, they came within the express exception of the statute, therefore the Court had no jurisdiction, there not being any contract expressed or implied on the part of the plaintiff to build, equip or repair within the meaning of s. 4 of the Act.

Cameron (St. Thomas), for plaintiff. *Leggatt* (Windsor), for other claimants.

McDougall, Loc. J.]

WILLIAMS & DETROIT & L. E. R. W. CO. *v.* THE "FLORA."

Lien—None for money advanced to owner to pay for repairing, equipping and fitting out ship.

Ship registered at Detroit, U.S. The plaintiff railway company operating a road in Canada having connection at Port Stanley and Windsor, made a traffic agreement with the owner to ply between Port Stanley and Cleveland in connection with their railway. The owner of the ship was without means to properly fit out the ship, and plaintiff agreed in writing to advance $2,000 for fitting out the ship in the season of 1897. That sum was advanced and expended in painting, repairing, furnishing and outfitting steamer. The agreement provided that the earnings of the ship were to be handed over to the plaintiff and credited on advances. The owner employed workmen by the day and purchased material required. The agent of the owner disbursed all the moneys in payment to various workmen employed and merchants supplying goods, and instead of taking receipted accounts he procured payees to sign documents purporting to be assignments of various accounts or claims to the agent of plaintiff.

Objections were taken to plaintiff's right to recover, on the ground that the money was advanced solely on the credit of the owner in home port, and its payment was specifically secured by pledging earnings of ship, and was not therefore advanced on credit of ship; that the "Flora" was a foreign

ship, proceeded against to recover another claim in a British Court of Vic Admiralty, and this claim was for money advanced in a home port, to pay fo repairs, etc , executed in the home port, and is a claim for necessaries, an that this action cannot be maintained because it comes within the exception i s. 5 of Admiralty Courts Act, 1861, 24 Vict., c. 10 (Imp.): *The Mecca*, Probat Div., 1895; *The Albert Crosby*, 3 A. & E. 37; *The Sophia*, W. Rob. 368 *The Riga*, 3 A. &. E. 516.

Held, that payment by the agent of the owner satisfied and discharge any original claim of workmen or supply-men to the extent of such payments that the assignment to plaintiff agent did not alter the nature of the trans action between plaintiff and owner. The $2,000 being advanced by plainti to owner in home port, and being recoverable as necessaries, the express term of s. 5, 24 Vict., c. 10 (Imp.) prevent the claim being sued for in this Cour

Leggatt, for plaintiff. *Cameron* and *Robinson* (St. Thomas), for othe claimants intervening.

McDougall, Loc.J.] MCELHANEY *v.* THE "FLORA."

Seamen's wages—Lien—Musician.

The plaintiffs were musicians, and had an arrangement with the maste of the boat that they should have the privilege of meals and state rooms o the boat, and the right to collect from passengers gratuities for musical enter tainment furnished.

Held, as there was no contract to pay them wages, they were not seame within the meaning of the Merchants' Shipping Act, and were not entitled t claim any sum for their services on the said boat, nor were they entitled to se up a maritime lien.

Robinson (St. Thomas) for plaintiff. *Cameron* (St. Thomas) for plaintifl in consolidated action intervening.

McDougall, Loc.J.] BROWN *v.* THE FLORA.

Seamen's wages—Caretaker—Lien.

Claim for a lien and for wages earned while acting as watchman on th ship "Flora" during the winter of 1896-97, while the vessel was lying dis mantled at a dock in Detroit; the duties performed by the plaintiff wer keeping the vessel clear of snow and pumping out any water that accumulate in the hull.

Held, that the plaintiff could not rank as a seaman even within the broa lines laid down in the cases; that his services could only be regarded as being those of a landsman or shore laborer engaged by the owner to perform th duties of watchman. The vessel was not in commission or even preparing fo a voyage; she was dismantled, a portion of her machinery had been removed and she had neither master nor crew; and, though still in a legal sense a ship she was really little better than a hulk: *The Harriet Olcott*, Abb. Adam 299; *Th John T. Moore*, 3 Woods (U.S.) 61; *Phillips* v. *Thomas Scattergood*, 1 Gilp. *Turner* v. *Crocket*, Abb. 490; *The Island City* v. *Towell*, U.S. 375.

Hanna (Windsor), for plaintiff. *Cameron* (St. Thomas), for plaintiffs in consolidated action intervening.

McDougall, Loc.J.] COMER *v.* "THE FLORA."

Seaman's wages—Man in charge of confectionery stand—Lien.

The plaintiff was engaged on an excursion and passenger boat to look after the confectionery stand; and performed services for about six weeks; the vessel had to employ persons in various capacities in order to successfully carry on the line of business in which she was engaged. The Merchants' Shipping Act, 1854, s. 2, declares that for the purposes of the Act "seaman" shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship," and the interpretation clause of the Inland Waters Seaman's Act, R.S.C. c. 75, defines "seaman" as "every person employed or engaged in any capacity on board any ship, except masters and pilots.

Held, that the plaintiff was entitled to a maritime lien for wages due.

Hanna (Windsor), for plaintiff. *Cameron* (St. Thomas), for plaintiff in consolidated action intervening.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, J.] ORFORD *v.* FLEMING. [March 21.

Solicitor—Charging order—Form of.

In this case, noted ante 238, the order, as drawn up and settled, contained no provision for the sale of the judgment charged with the costs of the plaintiff's solicitors. The order was issued in the following form:—1. It is ordered and declared that the applicants are entitled to a charge on the judgment debt or sum mentioned in the notice of motion, and recovered in this action by judgment bearing date . . for the taxed costs, charges and expenses of the said applicants, of or in reference to such suit, as solicitors for the plaintiff, including the costs of and incidental to this application. 2. And it is further ordered that it be referred to one of the taxing officers to tax such costs as between solicitor and client, including the costs of and incidental to this application.

(It appears to have been contemplated that another application should be made after the taxation, if necessary, for an order to enforce the charge.)

W. R. P. Parker, for the applicants. *Coatsworth*, contra.

Rose, J.] MALCOLM *v.* PERTH MUTUAL FIRE INSURANCE CO. [March 28.

Malicious prosecution—Finding by jury of reasonable and probable cause—Bona fides—Malice.

In an action for malicious prosecution brought against an insurance company by reason of its laying an information charging the plaintiff with arson, and causing his arrest thereon, the jury found that the company's officers who

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laid the charge, believed it to be true ; but that such belief was not under the circumstances reasonable, and that they did not act on it laying the charge, and causing the arrest, but that they were actuated by other and improper motives.

Held, that the first finding, being a finding that the defendants acted on their honest belief, and the evidence warranting that finding, absence of reasonable and probable cause could not be held to have been shown, simply because further enquiries might have been made and further facts shown ; that the question of malice was of no importance, and the defendants were entitled to judgment.

Brewster and *Heyd*, for plaintiff. *Maybee*, for defendants.

Street, J.] RE BROWN *v.* CAMPBELL. [April 7.

Will—Estate tail—Dying without issue—R.S.O. c. 128, s. 32—Construction of.

Sec. 32 of the R.S.O. c. 128, is to be construed strictly, and is confined to cases in which the word "issue," or some word of precisely the same legal import is used ; and does not extend to cases in which the word "heirs" is used.

Where a testator devised to his grandson, his heirs and assigns forever, certain land with the qualification that in case of his "dying without leaving any lawful heirs" the land was to go to other persons named, the section was held not to apply, and that the grandson took an estate tail.

F. Denton, for petitioner. *C. C. Robinson*, contra.

Armour, C.J., Falconbridge, J. Street, J. } HENDRIE *v.* ONDERDONK. [April 21.

Railways—Construction—Damages caused by negligence—Action for, against sub-contractors—Limitation clauses--Dominion and Ontario Railway Acts.

The defendant was a sub-contractor for the construction of a tunnel on the line of a railway company, authorized by statute to construct the railway running through a city. In the course of the work the contractor cut the drains and water pipes connected with an adjoining house, of which the plaintiff was tenant, and prevented access to the house for a time ; the plaintiff's goods were also damaged by blasting, and by dust and smoke occasioned by the work of construction. In an action for damages,

Held, (1.) That as no negligence in doing the work was shown the plaintiff could not succeed. (2.) That even if a remedy by action was open to the plaintiff, that as the railway company when it was brought within the jurisdiction of the Dominion Legislature by 54-55 Vict., c. 86 (D.), preserved its right to set up the limitation clause in the Ontario Act, R.S.O. (1887) c. 170, s. 142, and this statute could be pleaded in bar to the action as well as the limitation clause in the Dominion Railway Act (51 Vict., c. 29, s. 287) ; that this defence was available to the contractor, and the action not having been commenced within six months from the time the damage was sustained was too late.

Wallace Nesbitt, for the plaintiff. *Dyce W. Saunders*, for the defendant.

Divisional Court.] CLARK *v.* KEEFER. [April 25.

Will—Trustees to sell for best price—Power coupled with trust—Discretion of trustees—Right of Court to enforce trust.

Where a power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time and manner of their bona fide exercise of it. Where, therefore, lands were devised to trustees upon trust, in their discretion to sell, as soon as they might deem it proper to do so, for the most money that could reasonably be obtained therefor; the trustees by a later clause, not to be answerable for the exercise or non exercise of the powers therein contained, or to the manner of the exercise thereof.

Held, that the power of sale was coupled with a trust to sell for the most money, etc., and that the Court would enforce such trust by requiring the most money to be obtained; the powers of the Court being in no way affected by the later clause exonerating the trustees, which extended merely to the time and manner of exercising the trust.

G. G. S. Lindsey, for plaintiff. *B. B. Osler*, Q.C., for defendant.

Ferguson, J., Robertson, J., Meredith, J. [May 6.

REGINA *v.* EDWARDS.

Criminal Code, s. 821—Indictment for rape—Conviction of common assault—Time within which complaint laid.

Notwithstanding the provisions of s. 841 of the Criminal Code a prisoner indicted for rape may be found guilty of common assault, although the complaint was not made or information laid within six months from the time when the matter of complaint or information arose.

Cartwright, Q.C., Deputy Attorney-General for the Crown.

Faulds, for the prisoner.

Divisional Court.] DAVIDSON *v.* HEAD. [May 9.

Division Courts—Claims over $100—Dispensing with taking down evidence—Necessity for written consent.

The consent required by ss. 22—123, of the Division Courts Act, R.S.O., c. 60 (O.), to dispense with the evidence being taken down in writing, in a case where the amount claimed exceeds $100, must be in writing and filed, a verbal consent therefor not being sufficient.

R. J. Maclennan, for the appeal. *John Greer*, contra.

Ferguson, J.] CARROLL *v.* CARROLL. [May 10.

Destroyed will—Parol evidence of contents by a witness of the will.

This was to establish the will of Eliza Carroll, deceased, dated in April, 1871. She became insane in 1872, and so continued until her death on December 11, 1897. The alleged will was made in favour of the plaintiffs, one of whom was named therein as an executrix, under a family arrangement

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whereby the plaintiffs agreed to support deceased for her lifetime in consider tion of a will being made in their favour of all her estate. The evidenc showed that the will was deposited in a drawer by the testatrix, locked by he and the key delivered to a brother, since deceased, who was named as a executor. About ten years after, the testatrix being insane, found the key an destroyed the will, some jewelry, valuable papers and coins by burning, an on the key being found in her possession by the plaintiffs, confessed what sh had done. The plaintiffs supported the testatrix during her lifetime. On h death this action was brought by the surviving executrix, who is also one the beneficiaries, and the other beneficiaries against the other heirs of th testatrix to establish the will or for specific performance of the agreement make a will in their favour. The defendants did not appear, and the plaintif moved for judgment.

Held, following *Brown* v. *Brown*, 8 E. & B. 88, that the will could b established by evidence of parties from recollection of contents of the wil and that the will was fully established by the evidence submitted, and th probate should be granted by the proper court to the surviving executri according to the practice of the court.

Duncan (Woodstock), for plaintiffs. No one appeared for the defendant

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Street, J.] BAKER *v.* TRUSTS AND GUARANTEE CO. [May 1

Bond—Condition—Maintenance and support—From time to time—Not r stricted to penal sum—Registration—Lien on land.

Plaintiff sold her share in her father's real estate to her brother and a cepted in payment a bond from him in a penal sum of $400, conditioned f her maintainance and support and giving her a lien on the land, which bon was registered. In an action for her maintenance after her brother's deat against subsequent mortgagees of the land,

Held, that she was not limited to the amount of the penalty in the bon but had the right to sue for her support as it accrued from time to time, an that the registration of the bond gave her a lien on the land in the hands assignees from the brother.

R. Smith and *Geo. H. Pettit*, for the plaintiff. *Jas. Leitch*, Q.C., for th defendants.

Divisional Court.] [May 1

FRASER *v.* LONDON STREET RAILWAY COMPANY.

Street railways—Foot-board on side of car—Invitation to ride on—Improp construction of bridge—Negligence—Excessive damages—New trial.

On an electric car on defendants' railway, there was a step or foot-boa running along the side of the car about a foot from the ground, leading doors in the centre and rear parts of the car, with a brass rail or rod abo chest high, for persons standing thereon to hold on by, and electric buttons communicate with the conductor. The plaintiff seeing that the car was fillin up rapidly, all the inside seats being occupied, and the rear platform crowde

jumped on the foot-board, the car then having started. About six hundred feet from where the plaintiff got on was a bridge, which it had to cross, the approach thereto being on a curve, by reason of which the plaintiff was swayed out from the car, and as the car entered on the bridge, he was struck by one of the side posts of the bridge, thrown off and injured, the space between the post and side of the car being only fourteen inches.

Held, that an invitation to the plaintiff to stand on the foot-board, must be implied, and while there he was entitled to be carried safely, which the improper construction of the bridge prevented defendants doing, and which, therefore constituted evidence of negligence.

A verdict for the plaintiff was sustained, except as to the damages, $3,300, which were held to be excessive, and a new trial was directed unless the plaintiff consented to their being reduced to $2,000.

The mode of assessing damages necessary in cases of this kind was considered.

The fact of the plaintiff getting on the car while in motion did not of itself disentitle him to recover, for that was not the cause of the accident.

Duncan Stuart, for plaintiff. *I. F. Hellmuth*, for defendants.

Meredith, C.J., Rose, J.
MacMahon, J. } [May 25.

EWING *v.* CITY OF TORONTO.

Costs—Third party—Dismissal of action—Discretion of trial judge—Appeal.

Where a third party has been brought into an action by the defendant, and an order has been obtained by the defendant directing that the question of indemnity as between the third party and the defendant be tried after the trial of the action, and that the third party be at liberty to appear at the trial of the action and oppose the plaintiff's claim, so far as the third party is affected thereby, and at the trial the action is dismissed,

Semble, that the third party is entitled against the defendant to costs up to and inclusive of the trial.

Held, however, that the disposition of such costs is in the discretion of the trial Judge, whose order, by R.S.O., c. 51, s. 72, is not subject to appeal without leave.

Held, also, that the third party can not be heard in a Divisional Court upon an appeal by the plaintiff from the judgment at the trial, and is entitled to no costs of such appeal.

G. A. Kingston, for third party. *Fullerton*, Q.C., for defendants.

Street, J.] BROCK *v.* BENNESS. [May 26.

Limitation of actions—Infant heir-at-law—Entry—Evidence of—Lease—Estoppel—Adverse title—Overholding lessees—Tenants in common.

In an action of ejectment, it appeared that the father of the defendant died intestate in 1849, the owner of the fee and in possession of the lands in question. He had been twice married, but none of the children of his first marriage had been heard of since 1853. His widow continued in possession

after his death with her children, and married again in 1852, and her husband lived with her upon the land until her death intestate in 1871. At this time her husband and the youngest daughter of her first marriage, the defendant were the only members of the family upon the land. Soon after her death her eldest son made a lease of the land to his stepfather, and his sister, the defendant for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which was executed by the lessees, the lessor was described as the eldest son and heir-at-law of the father, the original owner. This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption until 1892, when the stepfather died intestate, leaving a son, one of the plaintiffs, surviving him, and since that time the defendant had been in possession, also without acknowledgment or interruption, until this action was brought in 1897, by the surviving brother and sister of the defendant and her half-brother. The lessor had died in 1878 it was said that he left one son, who, when very young, in 1880, was taken by his aunt, one of the plaintiffs, in the house upon the land, where he stayed one night; and the aunt said that she told her sister, the defendant, that he was the heir to the property.

Held, 1. Even if the boy were the time owner, this was not an entry upon the land, as owner, sufficient to stop the running of the statute.

2. The defendant and her stepfather, being in possession without any title, and accepting a lease from the eldest son of the second marriage, as the heir-at-law, were estopped from setting up the adverse title of the real heir-at-law, the eldest son of the first marriage, as against the lessor or persons claiming under him.

3. The plaintiffs' claim to possession under a conveyance from the alleged heir-at-law of the lessor could not be allowed, because there was no evidence that he was the heir-at-law, and because his title, if he had any, had been barred by the possession of the defendant and her stepfather since 1876, when the lease expired.

4. The title acquired by the defendant and her stepfather by length of possession was acquired by them as tenants in common, and not as joint tenants, and therefore upon the death of the latter, his undivided half descended to his son.

Ward v. *Ward*, L.R. 6 Ch. 789, distinguished.

T. H. Luscombe, for the plaintiffs. *Talbot Macbeth*, for the defendant.

Rose, J.] [May 26

SCOTTISH ONTARIO AND MANITOBA LAND CO. *v.* CITY OF TORONTO.
DEFOE *v.* CITY OF TORONTO.

Municipal corporations—Waterworks—Supply of water—Statutory obligation—Breach of contract.

In actions by consumers of water against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevators according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevators,

Held, that there was no right of action in the plaintiffs by reason of any statutory obligation on the part of the defendants.

2. That on the evidence, there was no contract between the plaintiffs and the defendants, by which the latter were bound to supply the former with water free from sand.

The relation was rather that of licensor and licensee than one founded upon contract.

Ritchie, Q.C., and *H. M. Mowat*, for the plaintiff company. *Walter Read*, for the plaintiff Defoe. *Robinson*, Q.C., and *Fullerton*, QC., for the defendants.

Boyd, C.] DORSEY *v.* DORSEY. [May 27.

Husband and wife—Separate estate of wife—Husband's interest in—Renunciation—Rights of administrator of wife's estate—Evidence of renunciation—Construction of document.

A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to his share in her land, by virtue of R.S.O., 1897, c. 127, s. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself. And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest. The administrator of her estate, duly appointed, has a status to set up the husband's renunciation in answer to a claim by him to a share in the estate.

The husband, before marriage, signed a writing as follows: "This is to certify that I, H.D., through marriage to A.E.T., will not assert any right or claim to the property of the said A.E.T., either real estate, cash in bank, household or personal effects."

Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage, and was sufficient to protect the estate of the wife from any claim of the husband, after the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896.

W. H. Irving, for plaintiffs. *C. A. Ghent*, for defendant.

Armour, C.J.] MANNING *v.* ROBINSON. [June 2.

Will—Construction of—Gift to charities—Validity—Legacies—Deduction of legacy duty—"Protestant charitable institutions."

On motion for judgment on the pleadings in an action for construction of the will of James Robinson, deceased.

Held, 1. The gift of the residue to the executors to be distributed "among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they . . may deem

proper," was a valid gift, having regard especially to s. 8 of 55 Vict., c. 20 R.S.O., c. 112, the provision in force at the time of the testator's death in 1895.

2. The legacy duty payable to the Government is to be deducted from the legacies and should not be paid out of the residue, and the plaintiffs had no discretion to pay such duty out of the residue: *Kennedy* v. *Protestant Orphans Home*, 25 O.R. 235.

3. The House of Refuge for the Poor of the County of Peel is not within the terms of the residuary gift. The word "Protestant," as used in the will, is referable as well to the objects of the charitable institutions as to their government; and "Protestant charitable institutions" are such charitable institutions as are managed and controlled exclusively by Protestants, and are designed for the bestowal of charity upon Protestants alone.

Justin, for plaintiffs. *Holliss*, for Robinson. *J. R. Cartwright*, Q.C., for the Attorney-General.

Boyd, C., Robertson, J., Meredith, J. } IN RE SOLICITOR. [June 13

Appeal—Consent order—Denial of consent—R.S.O., c. 51, s. 72.

The order of STREET, J., ante 388, was affirmed on appeal, without costs of the appeal to either party.

T. J. Blain, for the appellant. *Aylesworth*, Q.C., for the solicitor.

Meredith, J.] FITCHETT *v.* MELLOW. [June 17

Costs—Scale of—Jurisdiction of County Court—Trespass to land—Injunction—Counter claim—Declaratory judgment.

An injunction is a remedy, not a cause of action; and, semble, that before 59 Vict., c. 19, the County Courts had power under R.S.O. 1887, c. 47, s. 21, to grant injunction in actions within their jurisdiction, in which an injunction would have been the proper remedy. Now under s. 23, sub-s. 8, of R.S.O. c. 55, a County Court can give a judgment for nominal damages, and an injunction in an action for trespass to land where the value of the land does not exceed $200.

An injunction is equitable relief; and semble, that the provisions of sub-s. 13 of the same section would also enable the Court to give such a judgment.

A counter claim upon which no relief is given can make no difference as to the jurisdiction of a Court; and semble, also, that a judgment declaring a right can be given in a County Court by virtue of sub-s. 13.

Where an action of the proper competency of a County Court was brought in the High Court, the successful plaintiff was allowed costs on the County Court scale, with a set-off to the defendants of the excess of their costs over County Court costs.

Clute, Q.C., for the plaintiff. *H. E. Rose*, for the defendants.

FIRST DIVISION COURT OF WENTWORTH.

SHANNON *v.* O'BRIEN.

Landlord and tenant—Distress—Exemptions, R.S.O. 1897, c. 170, s. 30.

A monthly tenant's rigt to exemptions is not cut down by sub.-s. 2 of s. 30 R.S.O. 1897, c. 170, and he is entitled to his exemptions, notwithstanding more than two months' rent is owing.

Harris v. *Canada Permanent L. & S. Co.*, ante. p. 39, followed.

[HAMILTON, May 30, 1898. SNIDER, Co. J.

This was a monthly tenancy, and three months' rent at $5 per month was in arrear. The landlord seized household goods of the tenant which would be exempt from seizure under an execution. This action was brought to recover the goods which are still held unsold.

J. G. Farmer, for plaintiff. *G. Lynch-Staunton*, for defendant.

SNIDER, Co. J.—By R.S.O., 1897, c. 170, s. 1, the tenant has a right to these goods as exempt from seizure for this rent. This right existed under R.S.O. 1887, c. 143, s. 27. But an attempt was made to cut down this right in case of monthly tenancies, in 55 Vict., c. 31. At least I think that is the intention of sub-s. 2 of s. 30, of c. 170. I have endeavoured with the aid of Mr. Staunton's argument to find a meaning for this sub-section that can be applied to this case, but I confess I cannot do so. I recognize that it is my duty to give effect to the intention of the legislature if I can discover it, but I cannot. If it means as argued that the tenant is only to have $10 exempt in this case, how can I give effect to it? By s. 2 of c. 77, R.S.O. 1897, the goods are exempt, there is no alternative right to sell them and give the debtor the money. Here she claims the goods, and I cannot order them to be sold and direct $10 to be given her, even if that is the intention of the sub-section, which I doubt. Then am I to say that she shall have none of the goods? I think not. I cannot select $10 worth and order restoration thereof. She was formerly entitled to the whole exemption. An attempt has been made by this statutory amendment to cut down this right—take away part of it. It should be clearly expressed, as she should not be the loser by any uncertain interpretation. I quite agree with and adopt the conclusions of my learned brother in the judgment in *Harris* v. *Canada Permanent L. & S. Co.*, ante. p. 39. I find that the goods are plaintiff's, and must be restored to her, defendant to pay the costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MCISAAC *v.* BROAD COVE COAL CO. [March 8.

Dismissing action for want of prosecution—Month's notice of intention to proceed under O. 60, r. 9 required.

The writ of summons herein was issued the 19th July, 1895. Appearance was entered the 2nd September following, and a statement of claim was

demanded, but none was ever delivered or filed. Defendant moved to dismi the action for want of prosecution, but failed to give a month's notice of inte tion to proceed in the action by motion to dismiss, under O.LX., R. 9.

Held, that it was inexpedient to alter the practice of the court as settl by *McLachlan* v. *Morrison*, 23 N.S.R. 193, in which case it was held that t rule was applicable to such a case, and that a month's notice of intention proceed was required.

MEAGHER, J., dissented.

A. McDonald and *F. Mathers*, for plaintiff. *McNeil*, Q.C., for defenda

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Full Court.] REGINA *v.* STEVENS. [March

Liquor License Act of 1886—Conviction—Appeal—Improper reception evidence—Certiorari—Matter within magistrate's jurisdiction—On remedy in such case by appeal.

Application was made for a writ of certiorari to remove into this court conviction for a violation of the Nova Scotia Liquor License Act of 1886, a amending Acts.

The application was based on the ground that the only evidence offer before the magistrate in support of the charge was that of the informant, private individual, and that under R.S.N.S. (5th series) c. 103, such eviden was not receivable unless the informant in open court, before proceeding give evidence, renounced the proportion of the penalty (one half) to which was entitled. It appearing that the matter was in all respects within t jurisdiction of the magistrate,

Held, that certiorari would not lie, but that the only remedy was by appe *The Queen* v. *Walsh*, 29 N.S.R. 521 followed.

R. L. Borden, Q.C., and *H. A. Lovett*, in support of application. *F. Congdon*, contra.

Full Court.] NORTH SYDNEY MINING, ETC., CO. *v.* GREENER. [March

Joint stock company—Action for calls—Plea of special agreement as to co ditions of subscription—Conflicting evidence—"Commence operations" Payment of stock—Condition precedent.

The defendant was sued for a call upon stock, of which he was alleged be holder in the plaintiff company. The main defence was that defendan subscription was not an absolute one, but was made on the faith of an agre ment between defendant and M., one of the incorporators of the compar under the terms of which defendant was to receive a certain number of shar non-assessable and fully paid up, as security for the performance of an agre ment made between M. and defendant in respect to certain coal areas whi were to be acquired by M. from defendant, and subsequently transferred M. to the company. The trial Judge having found against defendant

Held, that as the evidence was conflicting, and there was no preponde ance in defendant's favor, the finding could not be set aside.

Section 18 of the company's charter read, "This company shall not commence operations until 50 per cent. of its capital stock is subscribed, and 25 per cent of such subscription paid up."

Held, that the words "commence operations" were not intended to prevent calls being made on stock subscribed for, nor to prevent the board of provisional directors created by the Act from doing any acts for and in the name of the company within their power, so long as such acts fell short of what might properly be termed "commencing operations."

Held, also, that the subscription and payment called for by the section were not made a condition precedent to the creation of a body corporate, but were intended as a limitation upon the power of the company to commence operations until the pre-requisite was complied with.

W. B. Ross, Q.C., for appellant. *R. E. Harris*, Q.C., and *C. H. Cahan*, for respondent.

Full Court.] IN RE WIER. [March 8.

Mining law—Lease issued improvidently not containing provisions required by Act, not to be regarded as void but merely voidable—How attached—Court will not assume facts in favor of forfeiture—Acts of 1889, c. 23, ss. 6, 7, 8—Acts of 1897, c. 4, s. 4—Acts of 1897, c. 5, s. 1.

On the 15th October, 1896, W. made application to the Commissioner of Mines for a prospecting lease of certain gold mining areas. The application was refused by the Commissioner on the ground that the areas applied for were covered by a lease then outstanding.

By the Act of 1889, c. 23, s. 7, all leases of mines of gold, etc, were required to contain the provisions respecting the payment of rental, and its refund under certain conditions, contained in the sub-sections of section 6; but by s. 8, s. 7 was not to come into force until two months after the date of the passage of the Act (April 17th, 1889).

On appeal from the decision of the Commissioner it appeared that the lease outstanding at the time of the application made by W. was issued nearly a year after the passage of the Act of 1889, in the old form, and did not contain the provisions as to payment of rental, etc., required by that Act, but there was no evidence to show the date of the application for the lease or as to non-performance of work, etc.

By the Act of 1897, c. 4, s. 4, it was enacted that no lease of gold, etc., then outstanding, should be attacked or called in question in any Court unless within a year from the date of the issue thereof, and that all leases, etc., should, after one year from the date thereof be indefeasible and non-forfeitable, except for non-payment of rent or royalty, or in case of leases outstanding not under rental for non-working. By c. 5, s. 1 of the Acts of the same year it was enacted that leases applied for within two months of the 17th of April, 1889 (the date of the passage of the Act of 1889), and which were issued under the provisions of s. 7 of c. 23, without containing the provision in respect to the payment of rent, etc., were to be read and construed as if said leases had been issued containing such clause, etc.

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Held, Per RITCHIE, J. Assuming the application for the lease to have been made prior to the time at which s. 7 of the Act of 1889 came into operation, and that it was not affected by that Act, that it was in all respects in proper form, and that there was no pretence for declaring it void.

2. The Acts of 1897 (chaps. 4 and 5) were inconsistent with the idea that prior to the passage of those Acts leases such as that in question, were to be construed as if they contained the rental clause.

3. The effect of the legislation was to show that the legislature did not regard leases issued without such clause as void, but that they were recognized as existing leases.

4. If the lease in question was to be regarded as outstanding in 1897, the effect of c. 4, s. 4 of the Act of that year was to make it indefeasible, and forfeitable only for non-working.

5. Assuming that the lease had been improvidently issued and might have been set aside before the passage of the Act of 1897, after due investigation, that it was not competent of the Commissioner of Mines of his own mere motion and without investigation or notice to the lessee to set aside the lease as not having been issued in accordance with the terms of the statute, or for alleged breach of conditions which the lease did not contain.

Held, per TOWNSHEND, J., 1. Assuming that it was not competent to the Commissioner to grant the lease in question at the time he did, it was not open to a person in the position of W. to question its validity in such a proceeding as the present, but that the commissioner alone could question it in proper proceedings for that purpose.

2. The lease was at most voidable at the suit of the crown, and not void, and that therefore, the areas in question were not vacant at the time of the application by W.

3. The commissioner having decided that the lease was in force at the time of the application by W. it must be presumed that the work had been done in accordance with the terms of the Act, or, at any rate, it would not be presumed that it had not been done.

4. In the absence of any exception, the court must construe s. 4 of c. 4, of the Acts of 1897, as covering the lease in question.

5. The court could not assume in favour of a forfeiture facts which it was incumbent upon the party attacking the lease to prove. (Meagher, J., concurred on this point.)

Held, per HENRY, J., 1. Assuming the application for the lease in question to have been made under the old Act, that the rights and liabilities of the lessee were those provided for by that Act, and that the lessee could not be injuriously affected by the fact that the lease to which he became entitled prior to the 17th June, 1889, was not delivered until after that date.

2. S. 7 of c. 23 of the acts of 1889 could not be regarded as affecting every lease issued after the coming into operation of the Act, but must be confined to leases applied for under the new law.

F. T. Congdon, in support of appeal. *R. L. Borden*, Q.C., amicus curiae.

Full Court.] JORDAN *v.* MCDONALD. [March 8.

Criminal Code, ss. 25, 242, 262—Unlawfully wounding—Causing actual bodily harm—Arrest by constable holding warrant not indorsed for service out of jurisdiction—Arrest made independently of warrant—Question of fact for jury improperly excluded—Vindictive damages.

The Criminal Code, c. 25, enacts that if any offence, for which the offender may be arrested without warrant, has been committed, anyone who on reasonable and probable grounds believes that any person is guilty of that offence is justified in arresting him without warrant.

Held, that the words "may be" in s. 25 refer to those provisions of the code which authorize arrest without warrant, and include the offence of unlawfully wounding, under s. 242, that being one of the following sections referred to in s. 552, which provides for arrest without warrant in certain cases.

Defendant, a police officer in and for the town of Windsor in the County of Hants, arrested plaintiff at Halifax, in the County of Halifax, on a charge of having unlawfully assaulted, beaten, wounded and illtreated P., a police officer, while in the discharge of his duty, occasioning actual bodily harm. Defendant, at the time, held a warrant for plaintiff's arrest, but it had not been indorsed for service out of the jurisdiction. Apart from the warrant defendant had actual knowledge of the commission of the offence for which the arrest was made. In an action by plaintiff claiming damages for unlawful arrest and imprisonment,

Held, setting aside the verdict for plaintiff with costs, and ordering a new trial, that it was competent for defendant to contend that the arrest was made independent of the warrant, and to justify such arrest by showing that at the time the arrest was made he was aware that plaintiff had committed the offence of unlawfully wounding.

Held, also, that the question whether the arrest was in fact made under the warrant or for the offence apart from the warrant, was one that should have been submitted to the jury, and that the trial Judge acted improperly in excluding it from their consideration.

Held, also, that there was no distinction in principle between the position of the defendant in this case and the position of a constable who holds two warrants, one of which is defective.

Held, also, that the trial judge erred in leaving it open to the jury to understand that they were at liberty to give vindictive damages in the absence of evidence of malice, oppression, or misconduct on defendant's part.

Held, also, that the trial judge erred in rejecting evidence offered to show that plaintiff had wounded P. in the assault for the commission of which the warrant was issued.

W. E. Roscoe, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

Full Court.] MCNEIL *v.* MCPHEE. [March 12.

Statute of Frauds—Setting aside deed—Knowledge on part of grantee of grantor's indebtedness and circumstances—Absence of valuable consideration—Not necessary to show fraud.

On the 23rd March, 1891, plaintiff commenced proceedings against the defendant, M. M., to recover the amount of a debt due him by M. M. On the 29th January of the following year judgment was entered by consent in plaintiff's favor for a smaller amount, which he agreed to accept, with costs.

On the 24th June, 1891, M. M. executed and delivered to his son and co-defendant, A. M., a deed of his farm, upon which he resided.

In an action brought by plaintiff to set aside the deed as made fraudulently, and in violation of the provisions of the statute, 13th Eliz., the defence was that some four years before the recovery of the judgment, A. M. being about to leave home, his father, M. M., promised that if he would remain at home and work and contribute to the support of the family as he had been doing before, he would give him a deed of the farm, and that A. M. did remain at home and contribute to the support of the family, and that the deed was given in consideration of and in fulfilment of the promise so made.

The evidence showed that both when the alleged bargain was made and at the time when he took the deed A. M. knew of his father's indebtedness to plaintiff, and that he had no other means of paying his indebtedness than the property in question, and that the effect of the giving of the conveyance would be to defeat and delay the plaintiff in the recovery of his debt.

Held, allowing plaintiff's appeal with costs, that the deed made under these circumstances was fraudulent within the meaning of the statute, and that A. M. in view of his knowledge of plaintiff's claim, and the inability of the grantor to pay stood in no better position than his father.

Held, also, that the consideration for the deed was at most meritorious, and that in the absence of valuable consideration the rule requiring the party attacking the deed to prove fraud did not apply.

Montgomery v. *Corbit*, 24 App. Rep. 311, and *Ex parte Mercer*, 17 Q.B.D. 290, distinguished.

W. H. Fulton, for appellant. *H. Mellish*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court] GORMAN *v.* URQUHART. [June 7.

Taxation of costs—Repeal of former table of fees.

Costs in Supreme Court suits for services performed before the coming into force of the Supreme Court Act, 60 Vict., c. 24, which repealed the old table of fees, alike with those performed after the coming into force of the said Act, are taxable under the new scale.

Rule for review of taxation refused.

A. J. Gregory, in support of rule.

Full Court.] DAYTON *v.* VERRETT. [June 9.

Replevin—Suit in County Court—Motion to Supreme Court en banc.

The Supreme Court Act, 60 Vict., c. 24, s. 357, does not contemplate that the motion in behalf of the party dissatisfied with the finding of the judge or jury on the claim of property in a replevin suit in a County Court shall be made to the Supreme Court en banc ; the motion in a County Court suit must be made before the County Court judge "according to the course and practice of the Supreme Court." as per s. 56 of the County Courts Act, 60 Vict., c. 28. Motion dismissed.

John M. Stevens, in support of motion. *Arthur R. Slipp*, contra.

Full Court.] LEGER *v.* FIDEL. [June 10.

False imprisonment—Direction by defendant to constable—Non-suit.

In an action for false imprisonment the plaintiff proved an arrest by a constable, and that while the officer was driving him to gaol they met defendant, who asked the constable if he "was taking Julian down to gaol," and when the officer said yes, remarked, "all right, take him down," or "all right, go along."

Held, that this was not sufficient to make the defendant a party to the imprisonment. Appeal allowed with direction to County Court to enter a non-suit.

J. D. Phinney, Q.C., for appellant. *H. B. Rainsford*, for respondent.

Full Court. MACPHERSON *v.* LYONS. [June 10.

City of Fredericton Civil Court—Double fees—Copy of proceedings for review.

The City of Fredericton Civil Court Act, c. 55, s. 5, providing that "the fees to be taxed or taken for or by the Police Magistrate . . . in such civil actions" shall be double the amount of those "as provided for in Justices' Civil Courts," when such actions are for a larger amount than $20, extends to a copy of proceedings for review.

O. S. Crocket, in support of order nisi. *J. L. Marsh*, Police Magistrate, contra.

SAINT JOHN COUNTY COURT.

Forbes, Co. J.] KERR *v.* MURPHY. [June 6.

Action in County Court—Amount recoverable in Justice's Court—Costs—60 Vict., c. 28, s. 69.

Plaintiffs, residing and carrying on business in Saint John Co., recovered judgment for $16 in an action in the Saint John County Court against the defendant residing at Hayt Station, Sunbury Co., forty miles from St. John, and on a line of railroad. Plaintiffs to prove their case required the attendance of four witnesses, all of whom reside in St. John.

Held, that plaintiffs were entitled to County Court costs, under 60 Vic c. 28, s. 69.

C. J. Coster, for the plaintiffs. *J. R. Armstrong*, Q.C., for the defendan

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] REGINA *v.* GIBBONS. [May 2

Criminal Code, s. 404—Demanding money with intent to steal—Menaces.

Case reserved for the opinion of the Court on the following questio "Do the facts established by the evidence taken at the trial constitute demand of money with menaces with intent to steal such money within th meaning of section 404 of the Criminal Code?" The prosecutor kept licensed hotel, and stated in his evidence that the prisoner came to him an told him he was going to "pull" him, and wanted $75 from him as a conditio of not prosecuting him. Prisoner went away, but returned and told prosecut he must have the money to go away with. The prosecutor subsequently we to the license inspector, who had the prisoner arrested. The prosecutor ad mitted that he had previously been convicted of a violation of the Liqu License Act. Sir Thomas W. Taylor, C.J., before whom the prisoner wa tried, found him guilty, but before passing sentence upon him remanded hi to gaol, to obtain the opinion of the Court on the above question.

Held, KILLAM, J. dissenting, that the evidence was sufficient to justify th verdict of "guilty." Any menace or threat that comes within the sense of th word menace in its ordinary meaning, proved to have been made with th intent to steal the thing demanded, would bring the case within section 40 and it is not necessary that the menace should be such as a firm and prude man might and ought to have resisted, but it would be sufficient if it was suc as would be likely to affect any man in a sound and healthy state of min *Reg.* v. *Smith*, 4 Cox C.C. 42; *Reg.* v. *Robertson*, L. & C. 483; *Reg.* *Tomlinson*, 18 Cox C.C. 75 (1895), 1 Q.B. 403, followed.

Per KILLAM, J.—To warrant the inference of an attempt to steal, in th party making a demand of money under a threat to lay a charge or giv information, it would not be sufficient to show that the prisoner expected th threat to be successful, but it should be of such a character, or made in such manner that he may reasonably expect that it will so unsettle the mind of th party threatened as to take away the element of voluntary action. The should be a terror inspired similar to that necessary to constitute robber though it need not be a threat of violence to person or property. The should be something from which it would be proper to infer the express inte to steal, to warrant a conviction under this section, and such is, apparently, n necessarily to be inferred from the attempt to extort or obtain money. *Regi* v. *McDonald*, 8 M.R. 491, and *Rex* v. *Southerton*, 6 East 126, doubted.

McLean, for the Crown.

Taylor, C.J.] CHAZ *v.* LES CISTERCIENS REFORMES. [May 27.

Fire—Damages—Negligence.

The defendants in the autumn of last year used fire to burn a ring or guard round some of the hay-stacks on their farm, and, as they thought, effectually put it out before leaving it; but a high wind having arisen two days afterwards, some smouldering embers were blown into flame, and spread to the plaintiff's property causing damage to him. On the evidence given at the trial before the Chief Justice he was satisfied that the defendants' use of fire under the circumstances was a customary one for purposes of agriculture in this province, and was even justified by a statute of the provincial legislature, R.S.M., c. 60, s. 2; and he also found as a fact that the defendants were not guilty of negligence, having used every reasonable precaution to extinguish the fire, and having had reason to believe that it was completely extinguished.

Held, following *Owens* v. *Burgess*, 11 M.R. 75, and *Buchanan* v. *Young*, 23 U.C.C.P. 101, that the defendants were not liable to the plaintiff for the damages suffered by him. Action dismissed with costs.

Howell, Q.C.; and *Haney*, for plaintiff. *Aikins*, Q.C., and *Dubuc*, for defendants.

Province of British Columbia.

SUPREME COURT.

Walkem, J.] CARSON *v.* DAVIDGE. [May 12.

Right of witness to appear by counsel at trial.

At the trial of this action the manager of the C.P.R. telegraph office at Victoria, having been served with a subpœna duecs tecum to produce certain telegrams filed in his office at Victoria by the defendants, appeared and objected to produce the documents on the ground that they were privileged.

Gordon Hunter appeared as counsel for the witness to contend that he was not bound to produce the documents, and he was proceeding to argue the question when counsel for the plaintiff objected to his right to appear.

Held, following *Doe d. Rowcliffe* v. *Earl of Egremont*, 2 Moo. & Rob. 386, that the witness must himself state the grounds on which he contends he is not bound to produce the doeuments required, and the Judge is to decide on the validity of those grounds, and to give the witness the protection claimed if he finds him to be entitled to it.

Mr. Hunter was therefore not heard.

Archer Martin and *W. H. Langley*, for plaintiff. *L. P. Duff*, for defendants.

McCOLL, J.] REGINA *v.* WILLIAMS. [May 31.

Criminal Code, ss. 766, 777—Right of prisoner to re-elect as to mode of trial.

Herbert Robertson, for the prisoner, who had been committed for trial on the charge of theft, and had previously elected to be tried by jury, moved on the day of the opening of the assizes at Victoria for leave to abandon such

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election, and to re-elect to be tried by a judge without a jury, citing *Reg.* *Prevost*, 4 B.C.R. 326, and *Reg.* v. *Lawrence*, 5 B.C.R. 160. The sheriff ha been notified to produce the prisoner before the judge, but under instructio had not done so.

Smith, Deputy Attorney-General, objected that the prisoner not bei before the judge, the case differing in this respect from *Reg.* v. *Prevost*, order could be made, and that *Reg.* v. *Ballard*, 28 O. R. 489, 1 Can. Cri Cases 96, showed there were no means of securing his presence.

Application refused.

North-West Territories.

NORTHERN ALBERTA JUDICIAL DISTRICT.

SUPREME COURT.

Rouleau, J.] LOWTHER *v.* JOHNSON. [April

Distress for rent—Tenants in common.

The defendant and one Fulmer became on January 2, 1896, tenants-i common of a certain lot. On May 1, 1896, Fulmer leased the premises to t plaintiff in his own name, without the knowledge or consent of the defenda and collected and retained the whole of the rents. In November of the sa year defendant notified the plaintiff of his half interest in the premis demised, and demanded payment for the future of half of the rents to hi and at the time notified his co-tenant of his demand. The plaintiff continu to pay the whole rent to Fulmer, and on July 22, 1897, defendant caused a d tress to be made on the plaintiff's goods, whereupon the plaintiff brought t present action for illegal distress, claiming $50 damages.

Held, that the distress was illegal, as there was no demise from defenda to plaintiff. The defendant's remedy is by action for use and occupati *Harrison* v. *Barnby*, 5 T. R. 246, distinguished.

P. McCarthy, Q.C., for plaintiff. *James Short*, for defendant.

Book Reviews.

A Digest of the Law of Agency by WILLIAM BOWSTEAD, of the Mid Temple, Barrister-at-law, Second Edition; London: Sweet & Maxw Ltd., 3 Chancery Lane, 1898.

This book, like many of those of the present day, is made on the princi of a code, the law relating to agency being reduced in a concise statement definite rules and principles, illustrated by cited cases. It will readily be se that this method involves great labour and accuracy, a very different thing fr the pitchforking together of cases practised by many authors. A full inde

a helpful addition. Several new articles have been added to the first edition, and the number of illustrations of cases cited have been considerably increased. Those reported to the end of 1897 have been noticed, and references made to those appearing in *The Times* Law Reports. This book has been well received in England, where it has met with great success.

A Yearly Abridgment of Reports of all Cases decided in the Superior Courts in England during the Legal Year, 1896-7, by ARTHUR TURNOUR MURRAY, B.A., Oxon, Lincoln's Inn, Barrister-at-law; London, Butterworth & Co., 7 Fleet St., E.C., 1898.

This abridgment is a digest of the cases from the 24th October, 1896, to the 24th October, 1897, in all the English Reports, together with a selection from the Scotch and Irish Reports, preceded by complete lists of all cases, statutes and rules cited, and concluding with a copious is index to the points of law considered, similar to the analytical index which given at the conclusion of each volume of this journal. Mr. Murray's system seems to be a very complete one. Unlike an ordinary digest it is not a mere compilation of existing head notes, but consists of an analysis, the result of a careful perusal by the editor of each case. This combination of systems is new, and is strongly recommended by those who have used the book. Part I. contains a list of the cases cited, the statutes and Rules, with list of defendants and cross references alphabetically arranged. Part II. gives the analysis above referred to with a list of the cases cited on the argument, the results of all appeals from the cases appearing in the abridgment, so far as they are reported, up to and including February 1st, 1898. Part III. is the distinctive feature, consisting of a subject index to points of law judicially considered, arranged alphabetically. This seems to be carefully prepared, and is a valuable addition to a work of this kind. We have no doubt that this work will become as popular with the profession in England, as that of Messrs. Masters & Morse is in Canada.

A Treatise on the Insurance Laws of Canada, embracing Fire, Life, Accident, Guarantee, Mutual Benefit, etc., by CHARLES M. HOLT, L.L.L., Barrister, Montreal Bar; Montreal, C. Theoret, Law Publisher, 11 & 13 St. James Street, 1898.

This is a book of nearly 900 pages. Its subject matter was first prepared by Mr. Holt in lecture form, and delivered at the Law Faculty of Laval University. We doubt whether this may be generally considered as a good foundation for a law book, though it indicates a familiarity on the part of the author with the subject matter.

The preface states that the aim of the author has been to cover as far as possible the whole ground of the subject matter of insurance; to give in digested form, with comments and notes, all enactments on this subject of the Dominion Parliament and of the Local Legislature; to analyze the jurisprudence of the courts of each of the provinces under the Supreme Court, deducing therefrom general principles applicable to insurance contracts, and com-

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paring Canadian legislation and jurisprudence with that of foreign countries and that of each of the provinces with the others.

The author begins with a history of the contract of insurance, its nature, and the different kinds of insurance. These chapters are of much interest, well written and unattainable elsewhere, so far as we know, in any collected form. The more strictly legal portion of the work commences with chapter 3, which speaks of the powers of parliament and the local legislatures over the subject matter of insurance, followed by a discussion on the making of the contracts and the many subjects which necessarily come up for discussion in detail in the construction of a work on this very important subject.

That Mr. Holt has devoted to his task great diligence and thoroughness of research, and has given the profession a large amount of useful information is beyond question.

But everyone is not sufficiently familiar with book making and legal literature, to give the matter in that accurate and workmanlike shape which the profession expects in these days of law book making, and we fear that defects in this respect will, so far as the casual observer is concerned, detract from the value of the work done. For example: the names of cases cited sometimes appear in one type, and sometimes in another; mistakes in spelling are not unknown; cases are cited in various different ways, and some of them will be difficult to find by those not familiar with the reports, some of which, moreover, do not appear in the table of abbrèviations. We suppose we may fondly assume that the reason the name of this journal does not appear in these abbreviations, though our reports are freely cited, is because the profession at large of course know all about us, and we have therefore no cause of complaint. And here we would suggest to the readers of the book before us to note that as to the case of *In re Darling*, which is referred to on p. 554, the valuable judgment delivered by His Honour Judge Morgan (not "Mr. Justice Morgan") is to be found reported in full in 33 C.L.J., p. 439, and not elsewhere. It would have been convenient for the author to have given this citation.

These, however, are small matters, and will doubtless be remedied in a future edition, for most certainly we should have a good Canadian book on this subject, and it may be that Mr. Holt's work will take that position. Whilst feeling compelled to draw attention to these minor defects, we are satisfied that Mr. Holt has given to the profession a volume which will be of great value, and will doubtless find a ready sale.

The addition of the word "trustee" to the name of the payee of a note is held in *Tradesmen's Nat. Bank* v. *Looney* (Tenn.), 38 L.R.A. 837, ineffectual to defeat the negotiabiltty of the note if inquiry would have shown that the word was merely descriptive, and that the note was given to be turned over by him, as was done. It is also held that the addition of the word "trustee" to his name when indorsing the note does not affect his liability as such indorser.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1897.

Tuesday, Nov, 16th.

Present, between 10 and 11 a.m.: The Treasurer, Messrs Barwick, Bayly, Edwards, Shepley and Strathy, and in addition, after eleven, the Attorney-General and Messrs. Bruce, Douglas, Gibbons, Guthrie, Hogg, Hoskin, Idington, Martin, O'Gara, Osler, Robinson and Wilkes.

Ordered that the following gentlemen be called to the Bar: W. H. Burns (with honors), H. N. German, C. Kappele, J. C. T. Thompson, W. A. Hollinrake, J. E. Ferguson, J. R. Brown, S. B. Harris. Ordered that the gentlemen last mentioned, with the exception of Mr. S. B. Harris, whose time had not expired, receive their certificates of fitness.

Ordered that Mr. E. H. Cleaver, who had completed the additional period of service ordered by Convocation, be called to the Bar and receive his certificate of fitness.

The complaint of Mr. R. Bowker against Mr.———— was read, and the Secretary was ordered to inform the complainant that his complaint did not present a case in which Convocation ought to interfere

A report was presented from the Discipline Committee setting forth that the complainants against Mr. G. had not appeared on the day appointed for the investigation, and had intimated that the complaint would be abandoned.

Mr. Barwick, in the absence of Mr. Aylesworth, moved pursuant to notice, that in view of the expense and delay necessarily involved in the preparation of a consolidated digest for the century, the scheme be abandoned.—Lost. Yeas 4. Nays 10.

Ordered that the Reporting Committee be placed in charge of the publication of the Century Digest, and that they be asked to report upon the cost of editing and compilation at the meeting of Convocation on the 3rd of December next, and that the Joint Committee of the Reporting and Finance Committees shall be continued as to any printing contract, and as to the price at which the Digest is to be issued.

Convocation then entered upon consideration of the Report of the Discipline Committee, upon the complaint of John O'Connors against Mr. T. C. Robinette. Mr. Robinette was in attendance. Ordered that the Report be adopted, and that Convocation deal with the question of discipline on the first day of the sitting in Hilary Term, 1898. Mr. Robinette was informed of the decision.

Ordered that Mr. F. C. S. Knowles be allowed his third year examination, passed prematurely, and that he be called to the Bar to receive his certificate of fitness, and that Mr. J. R. L. O'Connor, who had completed the additional period of service ordered by Convocation, be also called to the Bar and receive his certificate of fitness.

The following gentlemen were then called to the Bar: Messrs. W. H. Burns, C. Kappele, J. T. C. Thompson, W. A. Hollinrake, J. E. Ferguson, J. R. Brown, S. B. Harris, E. H. Cleaver and, F. C. S. Knowles.

Ordered upon a report from the Legal Education Committee that Mr. G. F. Kelleher attend forty lectures of the third year, in addition to those already attended by him, and that upon the principal being satisfied with his attendance and conduct, he be called to the Bar and receive his certificate of fitness.

Mr. Shepley laid on the table the schedule of the Christmas Examinations of the second and third year.

Ordered upon a report of the Legal Education Committee, that the following gentlemen, whose notices have remained posted since last Term, be

admitted as of Trinity Term: Messrs. T. Gibson, H. V. Hamilton and W. A. McKinnon, of the Graduate Class, and Messrs. A. H. Armstrong, C. H. Dunbar, W. Elmo Marshall and F. L. Sutherland, of the Matriculant Class.

Ordered that the following gentlemen be admitted as students-at-law: Graduate Class—Messrs. J. L. Counsell, J. H. Couch and A. E. McNab. Matriculant Class—Messrs. A. G. Austin, F. L. Button, A. E Bowles, C. R. Deacon, J. M. Kerns, A E. Millican, Alec. McDonald, W. A. Nisbett, W. E. Payne and T. A. Watterston.

Ordered upon a report of the Legal Education Committee, that the following gentlemen whose applications for admission are irregular, viz.: Messrs. W. G. R. Bartram, W. E. Dunn, W. A. Duff, H. K. Gray, A. M. McLean, G. H. Smythe (Grad.), W. E. Seaborn and G. E. Taylor (Matr.), under the special circumstances be admitted as of Trinity Term, and that the general question of irregular admissions be considered on Friday the 3rd inst.

A report was presented from the Legal Education Committee recommending that certain persons, not members of the Society, be permitted to attend the lectures of the Law School subject to proper arrangements with regard to fees, and pointing out that no objection existed to the opening of the School to the extent proposed, as this course would tend greatly to popularize the School, and extend its usefulness and make it a centre of legal education. The report was received and referred to the Legal Education Committee, to formulate a scheme.

A report was presented from the Legal Education Committee upon the proposals of the Principal as to honors at the Law School and compulsory attendance on lectures. The consideration of the report was deferred until the first Sittings in Hilary Term, and it was ordered that special notice of such consideration be given.

On the report of the Legal Education Committee it was ordered as follows: That Mr. J. C. L. White be permitted under the special circumstances of his case, to present himself for examination at the coming Christmas examination in the subjects of Practice, Equity and Evidence, and in the meantime to proceed with the work of the third year. That Mr C. A. S. Body serve until the day before the last day of Michaelmas Term and that he be then called to the Bar and receive his certificate of fitness That Mr. R. H. M. Temple be transferred to the Graduate Class, as of Michaelmas Term, 1897. That the petition of Mr. W. B. S. Craig be not granted. That Mr. J. Campbell Elliott be allowed the second year examination with honors.

The complaint of the Huron Law Association against Mr. R. L. Taylor was referred to the Finance Committee with power to act.

Ordered upon the report of the Committee on Journals and Printing that the annual sum of $100 be paid to the publishers of the CANADA LAW JOURNAL for publishing the resume of proceedings and furnishing extra copies, and that in the event of the resume exceeding 25 pages in any year the excess be paid for at the rate of $3 a page.

Wednesday, 17th Nov., 1897.

There being no quorum at the hour of 10.30, the senior barrister present adjourned the meeting until Friday, December 3rd.

Friday, 3rd Dec., 1897.

Present: The Treasurer, Messrs. Aylesworth, Bayly, Blake (E.), Britton, Bruce, Clarke, Martin, Ritchie, Robinson, Shepley, Wilkes.

Ordered that Mr. S. B. Harris receive his certificate of fitness. That Mr. C. A. S. Body be called to the Bar and receive his certificate of fitness That Mr. R. R. Bradley be admitted as a student of the Graduate Class, as of

Trinity Term; that Mr. W. E. Smith be admitted as a student of the Matriculant Class as of Trinity Term. The following gentlemen were then called to the Bar: Messrs. C. A. S. Boddy, J. R. L. O'Connor and E. C. Wragge.

Ordered upon the report of the Legal Education Committee as follows: that the fee in respect to the Christmas examinations be $20, and that $10 thereof be forfeited in case of a student failing to pass his examination, and that the whole sum of $20 or the balance of $10, as the case may be, be credited upon the fees payable for call and admission as solicitor; that the offer of the Edward Thompson Co., Publishers, to give a prize in connection with the Law School Examinations, be respectfully declined; that the terms upon which persons not members of the Law Society should be admitted to attend lectures in the Law School, be left to the Committee to be dealt with in its discretion, according to circumstances in each case.

A report was presented from the Legal Education Committee recommending under the peculiar circumstances of the case that the holding of his present position by Mr. J. G. O'Donoghue be not deemed to be inconsistent with the requirements of the Society as to service, and recommending that in future candidates for admission be required to make declaration that they do not hold and will not hold during their service under articles or attendance in chambers any office of emolument, and that they are not and will not be employed in any occupation whatever other than student in chambers or clerk under articles, as the case may be, or to specify for the information of Convocation the nature of such office or occupation if any. The report, so far as it referred to Mr. O'Donoghue, was adopted on a division; the remainder of the report was referred back to the Committee to consider what amendment, if any, to Rule 150, would be required if the report were adopted.

The Joint Committee to which was referred the recommendation of the Finance Committee regarding the Phillips Stewart Library, reported that they were of opinion that a supplemental grant was not now necessary to the efficient maintenance of the Library, having regard to the purposes which it is intended to serve, and recommending its discontinuance, but that such discontinuance should not have any retroactive effect prior to tne date upon which Convocation adopted the prior recommendation. The report was adopted

The following report was presented from the Legal Education Committee upon the subject of irregular applications for admission:—

Your Committee has under consideration a practice which has grown up under which applicants for admission to the Society, whose qualifications are not in fact obtained in time for action by Convocation during Trinity Term, have been admitted as of that Term.

As to the obtaining of such qualifications the applicants may be divided into two classes. (1) Those whose qualifying examinations have in fact been held during or before Trinity Term, but whose certificates or diplomas cannot be produced either because the result of such examinations is not yet known, or because of delay in the issuing of such certificates or diplomas. (2) Those whose qualifying examinations have not been held until after the end of Trinity Term.

As to their notices each of these classes of applicants may be subdivided as follows:—(1) Those who have given regular notice before Trinity Term, or have given such shorter notice before or during that Term as Convocation, upon explanations made has been willing to accept, directing the notice to remain posted for an additional period. (2) Those who have not given notice until after the end of Trinity Term.

Your Committee is of opinion with regard to the first class, viz.:—those whose examinations have been held during or before Trinity Term, that if applicants of that class fall also within the first subdivision (having given either regular notice or such shorter notice, before or during Trinity Term, as Convocation has hitherto been willing to accept upon terms) there is reason-

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able ground for permitting such applicants, upon completing their paper before Michaelmas Term to be entered upon the books of the Society as c Trinity Term. In such cases the applicant has done all that lay in his powe to obtain the qualifications within the Term as of which he seeks admissio and it is not his fault that there has been delay either in announcing the resu of the examinations or in the issuing the certificates.

But with regard to the second class, viz.:—Those whose qualifying exam inations do not in fact take place until after Trinity Term, and also with regar to those of the first class who fall within the second sub-division (not havin given any notice until after the end of Trinity Term):—Your Committee is c opinion that there is no satisfactory principle upon which such applicants ca during Michaelmas Term be given a status upon the books of the Societ relating back to Trinity Term. The Committee recommend accordingly tha the practice in such cases be discontinued, and that the circular or curriculu issued for the information of intending applicants be amended accordingly.

GEO. F. SHEPLEY,
Dated 16th November, 1897. Chairman.

The report was adopted.

Mr. Shepley, on behalf of Mr. Watson, gave notice of motion to rescin the resolutions of Convocation relating to the publication of a Century Diges

The report of the Inspector of County Libraries was presented, and wa referred to the County Libraries Committee, and it was ordered that th Inspector, Mr. Eakins, be paid $200 for his services and expenses.

Ordered that the petition of Mr, C. C. Grant for admission as a studer be referred to the Legal Education Committee.

Flotsam and Jetsam.

Several years ago, the late Sir Francis Lockwood got a prisoner off b proving an alibi. Some time afterward the judge met him and said, "Wel Lockwood, that was a very good alibi." "Yes, my Lord," was the answer "I had three offered me and I think I selected the best."

A young lawyer was appointed to defend a negro who was too poor to hi counsel of his own. After the jury was in the box the young lawyer challenge several jurymen who, his client said, had a prejudice against him. "Are ther any more jurymen who have a prejudice against you?" whispered the youn lawyer." "No, boss, de jury am all right, but now I wants you to challenge d jedge. I has been convicted under him several times already, and maybe h is beginnin' to hab prejudice agin me."

The Calcutta *Weekly Notes* gives occasionally some choice morsels in th way of names. For example:—Sri Rajah Rao Lakshmi Kantaiyammi Sri Raja Inuganti Rajagopal Rao is the name of a suit which covers a point c practice, and was heard before the Privy Council. In another case the counse representing Dya Gazi, Ram Kumar Brindabun Chunder Kar and Ram La Sukul were respectively Babu Jogendra Chunder Ghosh and Babu Ha Mohun Chuckerbutty. The Madras *Law Journal* has, however, somethin distinctly superior in the following name: Sri Raja Chelli Kani Venkatarama nayamna Garu v. Appa Rao Bahadur Garu.

Canada Law Journal.

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LONG VACATION.

FROM TWO POINTS OF VIEW.

I. THE "BRIEFED."

Go, boy, and lock the office door—
Ye minions cease vexation;
A truce to clients rich and poor,
Heigho, 'tis Long Vacation!

I'm off to sail the heaving main
Loud with War's ululation;
But neither Uncle Sam nor Spain
Shall spoil my Long Vacation.

What matter if old Ocean's song
Brings gastric perturbation?
My liver on the *Continong*
Will have its Long Vacation!

And when September's cooling breeze
Revives my land and nation
Back, with keen appetite for fees,
I'll come from Long Vacation.

So, boy, go lock the office door—
Ye minions cease vexation;
A truce to clients rich and poor,
Heigho, 'tis Long Vacation!

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II. THE BRIEFLESS.

Hail, thou Long Vacation,
Welcomest cessation
From exacerbation
Born of exploitation
Of a daily ration
For my briefless life!
Whilst thy reign extendeth
Money-Bags, he lendeth—
Recking not of strife
Till the "Briefed" returneth
With a zeal that burneth
For small debtors' gore.
Then, with writs abounding,
Bailiffs will be sounding
Knocks upon my door;
Bidding me awaken
To the unmistaken
Fact, thy reign is o'er!

CHARLES MORSE.

Mr. E. R. Cameron, of London, Barrister-at-Law, has been appointed Registrar of the Supreme Court in the place Mr. Robert Cassels, Q.C., deceased.

We publish in another place a full report of the finding of the Judicial Committee of the Privy Council on the "Fisheries case," which decides many important questions in reference to Dominion and Provincial rights connected with rivers, lakes, harbors, fisheries, navigation, etc. This report will be read with interest at the present time, and is given to our readers in advance of the report which will appear in due course in the English Law Reports.

On the 25th June last the fifth seat in the Court of Appeal was filled by the appointment of Mr. James Frederick Lister, Q.C., of Sarnia. Having been for many years an active politician, and perhaps better known in that field than at Osgoode Hall, the appointment was criticised adversely by one portion of the lay press, and defended by the other, the persistency of some of his friends rather unhappily reminding one of the motto "Qui s'excuse s'accuse." It is not necessary for us to take part in that discussion. Suffice it to say that, whilst there are strong arguments against appointing active partisans to the Bench, it is a fact that many who have been so appointed have made excellent judges, and it would be ex-

tremely difficult in this country to work under such limitations. Although Mr. Lister may not have occupied that prominent position at the Bar which theoretically ought to be (but for many years has not been) a prerequisite for promotion to the Bench, his reputation is such that there is every reason to anticipate that he will make a useful member of the Court of Appeal. No one can safely prophesy in such matters. The profession have often been disappointed in some of those from whom much was expected, and agreeably surprised at the judicial capacity displayed by others, little thought of at the time of their appointment. Of one thing we are sure, and that is that Mr. Justice Lister will industriously, conscientiously and with unswerving integrity of purpose, devote his whole energies to the faithful discharge of the responsible duties of his office.

Judging from what appears in the daily papers it would look very much as though the tactics too often followed by the detective force are to be repeated in the Napanee bank robbery case. It would be well for these officers to remember that the labours of the counsel in the Clara Ford case were rendered very much easier by the lengthy and most objectionable private examination, before trial, to which the prisoner was subjected. It would be well for them also to remember the observations of the Court in *Reg.* v. *Day*, 20 O.R. 208, and the scathing remarks of Chief Justice Meredith in the Allison case on the same subject. Another feature of the Napanee case was the refusal of the sheriff to allow counsel for the prisoners to consult with their clients. The matter is, doubtless, one of discretion with the Crown until the case comes before the magistrate, when the prisoners have a right to the assistance of counsel; but, in view of the French "sweat box" system now in vogue, it is very necessary that prisoners should have the benefit of consultation with their counsel before being subjected to that process. A refusal to give them this privilege might properly be characterized as outrageous, except under very peculiar circumstances. Accused persons may be perfectly innocent, and yet statements made by them

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might be used and twisted by unscrupulous detectives supplement weak points in the prosecution, and so conv tions be obtained which the facts of the case would warrant.

EXEMPTIONS FROM DISTRESS.

We have received communications from several of subscribers, criticising the judgments in *Harris* v. *Cana Permanent L. & S. Co.*, ante p. 39, and *Shannon* v. *O'Brien*, a p. 421, dealing with a monthly tenant's right to exempti under R.S.O., c. 170, s. 30.

The statute in question has certainly been a heavy stra upon professional thinking machines. The two learn County Court Judges who gave the judgments in the cas above referred to, have done their best to settle the questi and their opinions are entitled to very great respect. The resu however, does not appear to have been entirely satisfacto certainly not from the landlord's point of view: and ev from an academic standpoint there appears to us to be gra doubt whether a correct conclusion has been arrived at.

The section in question relates to the exemption of goo from distress, and is as follows:

(1) The goods and chattels exempt from seizure und execution, shall not be liable to seizure by distress a landlord for rent in respect of a tenancy created after t first day of October, 1887, *except as hereinafter provided.*

(2) In case of a monthly tenancy the said exemptions sh only apply to two months' arrears of rent.

(3) The person claiming such exemption shall select a point out the goods and chattels as to which he clai exemption.

It is the second sub-section which appears to be diffic to understand. Reading it as we would read any oth document, the meaning would appear to be that in the ca of a monthly tenant he is only to be entitled to claim su exemption of his goods from distress in respect of tw months' rent, and if he is in arrear beyond that amount he

not as regards the excess to be entitled to claim any exemption. That, it is submitted, is the fair meaning of the words; but in the judicial crucible they have been submitted to tests which have virtually evacuated them of all meaning, and as the learned senior Judge of the County Court of York is compelled to confess, ante, p. 41: "Rather than guess at its meaning (i.e., the proviso in sub-section 2) it is better to say that the words have no meaning at all;" which is virtually the conclusion at which he arrives; and his reasoning is followed and adopted by the learned senior Judge of the County Court of Wentworth.

With much deference, however, we do not think that the course adopted by these learned judges is the better one. All language used in legal documents involves a certain amount of guessing as to its meaning, but it is only where the meaning is clearly so ambiguous and doubtful as to be incomprehensible, that a judge can properly refuse to give any meaning at all to a statute.

The first sub-section clearly contemplates that there are to be some cases or circumstances in which the exemptions cannot be claimed, for it concludes with the words "except as hereinafter provided." But the learned Judge of the County Court of York criticises the words of the proviso, such "exemptions shall only apply to two months' arrears of rent" in this way, he says the exemption spoken of in the first sub-section "does not apply to rent, but to goods. There is no such thing as an exemption applying to arrears of rent." This seems to be somewhat hypercritical. It is true, the language used in this statute, as in many others, may not be as critically exact as it might be, still, in spite of the learned judge's criticism, it seems reasonably plain. Exemptions, it is true, in one sense do not apply to rent, but to goods, yet it is obvious that the exemptions apply to the goods in respect of the claim to levy rent; and that, it appears to us, is clearly what is meant.

The learned judge refuses to give that effect to the words because it would cut down the previous right of the tenant to claim the exemption in respect of all rent in arrear, which,

we may say, it was clearly the intention of the amendment to do. He asks, does the clause mean that a tenant can claim for his goods exemption only when he is exactly two months in arrears with his rent; that if he be only one month in arrear, or three months in arrear, he can claim no exemption at all?" We do not think any such construction would be correct. The sub-section says: "In case of a monthly tenancy the said exemptions shall only apply to two months' arrears of rent." The fair reading of which we submit is that in respect of two months' rent or less, the exemptions can be claimed, but not for any excess beyond two months' rent. Although the learned judge suggests many alternative meanings of this sub-section 2, he does not refer to this, which seems to us to be the true one.

As to the learned judge's introductory remarks on the assumed harshness of the common law, which enabled a landlord to seize, with few exceptions, all of his tenant's goods, to satisfy his rent, it must be remembered that landlords are in an entirely different position to other creditors, and the common law very wisely and reasonably gave them special remedies for enforcing their claims. A tenant gets into possession, and in spite of his landlord's wish often remains in possession without paying rent. The landlord may stipulate for rent in advance, but such stipulations can only be enforced with difficulty and a rigour which few landlords would care to employ, and the experience of most landlords is that such stipulations are easily overcome by designing tenants, and if attempted to be enforced expense is incurred which in most cases is not recoverable from the tenant. We think there has been of late a great deal too much sympathy extended to the tenant, and far too little to the landlord, who frequently has to mourn dilapidated premises and loss of rent as the result of the indulgence he has extended to an ungrateful tenant, and we venture therefore to criticise rather freely decisions which tend unduly to deprive landlords of a right which we believe the legislature intended to give them.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—DELAY—DEPOSIT, LIEN FOR—STATUTE OF LIMITATIONS.

Levy v. *Stogdon* (1898) 1 Chy. 478, is a somewhat curious case. In April, 1886, Sir John Sebright contracted to sell to one Keays a contingent reversionary interest in £20,000 odd of Consols free from incumbrances, for £3,550. Keays paid £100 as a deposit. There were existing incumbrances which Sebright undertook to pay off, but did not. Sept. 25th, 1886, was fixed for completion, when the balance of the purchase money was to be paid, and in case of delay the purchaser was to pay interest at 5 per cent. Sebright subsequently became bankrupt, and he and his trustee in bankruptcy executed an assignment of all his property to one Baker, who subsequently mortgaged the reversionary interest above mentioned; Keays interest under his contract subsequently became vested in one Birch. The contingent interest having come into possession, Birch now claimed specific performance of his contract, or a lien on the fund for his deposit and interest. The claim to specific performance was resisted on the ground of laches on the part of the purchaser, and this defence, Stirling, J., held was entitled to prevail—but as regarded the claim to a lien for the deposit and interest he held that by virtue of the contract the vendor became trustee of the fund for the purchaser for the amount of his deposit, and that no Statute of Limitations applied to the case, nor any by analogy on which the Court ought to act, and he therefore held that to that extent Birch's claim must succeed.

MORTGAGOR AND MORTGAGEE—FURTHER ADVANCES—SUBSEQUENT INCUMBRANCES—MORTGAGE OF EQUITABLE INTEREST—NOTICE TO TRUSTEE—LIMITATION OVER IN EVENT OF ALIENATION BY CESTUI QUE TRUST.

The facts of *West* v. *Williams* (1898) 1 Ch. 488, are a little complicated, but are substantially as follows: Walter Williams under his father's will was entitled to an equitable

estate for life; this interest on 24th Dec., 1895, he mortgaged to the plaintiff, the plaintiff agreeing not to give notice to the trustees until 24th Dec., 1896. On April 2, 1896, Walter Williams made a mortgage in favour of P. A. Williams and another, to secure £2,297, and further advances agreed to be made to the mortgagor, and by a settlement of even date, in which after reciting the giving of the mortgage last mentioned, and that except as thereinbefore recited the settlor had not otherwise incumbered his life interest, he thereby assigned the same to trustees in trust for himself for life, "or until he should assign charge or incumber, or affect to assign, charge or incumber the same or any part thereof," and after the determination of his life estate for the settlor's wife and children. The action was brought to enforce the plaintiff's mortgage, of which notice was not given to the trustees of the fund until after the execution of the settlement above referred to. The priority of the P. A. Williams mortgage was conceded by the plaintiff, except as to advances made after notice of the plaintiff's mortgage, and two questions were raised, first as to the effect of subsequent advances made in pursuance of an agreement contained in the prior mortgage; and secondly, whether the limitation over on the alienation by Walter Williams was affected by his alienation to the plaintiff made prior to the settlement,—in other words, whether the limitation over had a retrospective operation. Kekewich, J., held that it had, and consequently that the plaintiff's right as mortgagee had been completely cut out by the subsequent settlement executed by his mortgagor; which seems a somewhat singular result; and he also held that the subsequent advances made under the agreement in the P. A. Williams mortgage after notice of the plaintiff's mortgage, were, even if the plaintiff's mortgage were a subsisting security, entitled to priority over it. He distinguishes the case from *Hopkinson* v. *Rolt*, 9 H. L. C. 514, on the ground that in that case there was no obligation on the part of the mortgagee to make the subsequent advances; and his decision on the effect of the settlement is based on *Manning* v. *Chamber*, 1 D. G. & Sm 282; and *Seymour* v. *Lucas*, 1 Dr. & Sm. 177.

SETTLEMENT—POWER OF APPOINTMENT—REMOTENESS—APPOINTMENT TO DAUGHTERS "WHO SHALL HEREAFTER MARRY."

In re Gage, *Hill* v. *Gage* (1898) 1 Ch. 498, an appointment of a fund was made under a power, in favour of the appointees, three unmarried daughters "who should thereafter marry," and also provided that so long as these daughters remained unmarried, the income of the residue of the fund should be paid to them equally, and in case "one or two only of them should marry" (which happened), then after the death or marriage of such last one as should be last living and unmarried, the capital of the residue should be paid to four other children, and such of the three daughters as should marry, equally. Kekewich, J., held that the ultimate gift over of the fund was void for remoteness, also that the appointment in favour of the three daughters who should marry was void for the same reason: but that the appointment of the income of the residue of the fund to the three unmarried daughters was a valid appointment of one-third to each daughter, as long as she was living and unmarried.

CONTINGENT REMAINDER—INTERMEDIATE RENTS BEFORE VESTING—LEGAL AND EQUITABLE LIMITATIONS.

In re Averill, *Salsbury* v. *Buckle* (1898) 1 Ch. 523, is an illustration of the maxim that equity follows the law. In this case a testator by his will dated in 1878, devised real property to the use of trustees in fee, upon trust for his daughter Annie for life, and after her death for her children, who being sons should attain 21, or, being daughters, should attain that age or marry, as tenants in common. Annie died in 1885 leaving six children, all infants under 21, and unmarried. The eldest child having attained 21 in March, 1897, it became necessary to determine what was the proper disposition of the rents; and Romer, J., held that the eldest child was entitled to the whole of the rents until the next child attained a vested interest, each child being admitted to share therein as he or she attained a vested interest, in the same way as if the limitations had been legal.

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ARBITRATION—AWARD—EXPROPRIATION OF LANDS BY RAILWAY—FINALITY OF AWARD.

Caledonian Ry. Co. v. *Turcan* (1898) A.C. 256, is a decision of the House of Lords in a Scotch case. The appellants gave notice to treat for certain lands required for their railway,—a question arose whether the part they wished to take could be severed from the rest of the parcel without material detriment. This question was submitted to arbitration pursuant to statutory provisions in that behalf: before the arbitrator the railway company offered to allow access to the remainder of the respondent's property, under a bridge to be erected over the portion proposed to be taken by them. The arbitrator found that the portion proposed to be taken could not be severed without detriment to the remainder, and awarded compensation upon the assumption that the railway was bound to take the whole premises. The action was brought to recover the compensation awarded, and the railway set up that the arbitrator had erred in rejecting their offer of access: but the House of Lords affirmed the decision of the Scotch Court of Session, holding that whether the arbitrator had erred or not was immaterial, as, until set aside by proper process, his award was final and conclusive on both parties, and could not be reviewed by the Court.

DEBENTURES—AGREEMENT TO ADVANCE MONEY ON—COMPANY—BREACH OF CONTRACT TO LEND MONEY—SPECIFIC PERFORMANCE—DAMAGES.

The South African Territories v. *Wallington* (1898) A.C. 309, was an action by a joint stock company to specifically enforce an agreement to lend money on the security of its debentures; the decision of the Court of Appeal (1897), 1 Q.B. 692, is noted ante, vol. 33 p. 619. The House of Lords (Lords Halsbury, L.C., Watson, Herschell, Macnaghten and Morris) have now affirmed the decision, holding that such an agreement cannot be specifically enforced, and that the plaintiffs could only recover such damages as they had actually sustained by reason of the breach of the contract, and as no such damages were proved the appeal of the plaintiffs was dismissed with costs.

MERGER – MORTGAGE—PURCHASE OF EQUITY OF REDEMPTION – PAYMENT OF PRIOR MORTGAGE BY PURCHASER OF EQUITY.

In *Liquidation Estates Purchase Co.* v. *Willoughby* (1898) A.C. 321, the equitable doctrine of merger of securities is considered; the trend of the modern cases on this subject has been in the direction that merger of an incumbrance is altogether a question of intention, and where there is no explicit evidence of intention, then merger of an incumbrance will not be presumed to have taken place, unless it is for the benefit of the party paying off the incumbrance; this view has now practically received the sanction of the House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten and Morris), they having reversed the judgment of the Court of Appeal (1896) 1 Ch. 726 (noted ante, vol. 32, p. 541). This agrees with *Hart* v. *McQuesten*, 22 Gr. 133, and other cases on this subject in the Ontario Courts.

LEASE—LIABILITY FOR BREACH AFTER DEATH OF COVENANTOR—DEVISEE OF REVERSION—GENERAL ESTATE OF COVENANTOR.

In *Eccles* v. *Mills* (1898) A. C. 360, a deceased lessor had made a covenant in a lease to finish laying down 1,000 acres, part of the land demised, with grass within a year. The lease also contained a subsequent declaration that "there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto." The testator died without having performed the covenant as to the grass, and by his will he specifically devised the reversion in the demised premises. Judgment was recovered against his executors for damages for breach of the covenant as to the grass, and the contest in the present case was whether such damages should be borne by the general estate of the testator, or by the specific devisees of the demised premises. The Supreme Court of New Zealand held that the devisees of the reversion must bear the burthen, but the Judicial Committee of the Privy Council (the Lord Chancellor, and Lords Watson, Hobhouse, Macnaghten, Morris, Shand, Davey, and Sir R. Couch) reversed this decision, holding that the covenant did not run with the reversion, and that it was not incident to the relationship of landlord and tenant, and liability

therefor properly fell on the general estate. And they mor over expressed the opinion that even if the covenant did ru with the reversion it was not a charge thereon, and as betwee the general estate and specific devisee, even in that view, th former was primarily liable for the payment of the damage as the covenant was a liability incurred not as incident to th relation of landlord and tenant, but as preparatory theret The following passage at p. 371 gives the rationale o the judgment. "It would seem that the nature o the obligation in each particular case must determin the question. If it is in its nature incident to th relation of landlord and tenant, it would only be fai that the burthen should be borne by the devisee as betwee him and the testator's estate, falling on him as landlord whether the agreement bears a seal or not. . . . On th other hand, if the covenant is not in its nature incident to th relation of landlord and tenant—if the thing to be done i something preparatory to the complete establishment of tha relation, it would seem to be fair and in accordance with th probable wishes of the testator, that the burthen of th covenant unperformed by him in his lifetime should be born by his estate rather than his specific devisees. In the pre sent case the object of the covenant was to insure th premises being put in a condition fit for the occupation of th tenant, under the lease. "Such a covenant is intended to b performed forthwith, not to remain attendant on the leas during its currency. In its nature it seems very differen from a covenant by the landlord to keep buildings on th demised land in repair, or to pay for unexhausted improve ments at the end of the lease."

CONTESTED ELECTIONS.

[COMMUNICATED.]

The attempt made some years ago to secure a better method of dealing with contested elections than that afforded by Parliamentary committees has been productive of abuses almost as flagrant as those which prevailed under the latter system. Political influence was potent in the committees to prevent anything like a judicial decision being arrived at. The same sort of influence now prevents the case from ever coming to trial, and the greater the need for enquiry the more likely it is that no enquiry will be held. If A on one side has been guilty of such acts of corruption as would inevitably void his election, and B on the other side has been equally guilty, a simple way to avoid damaging exposures, destructive of the reputation of party managers, and injurious to the trade of professional politicians would be to "saw off," as the phrase goes, the one against the other, and let both go scot free, and so by previous arrangement the petition is dropped altogether; or, if it has not been practicable to avoid the case being set down for trial, counsel for the petitioner is instructed to tell the court that no evidence has been found to sustain the charge set forth in the petition, and that therefore he desires the case to be withdrawn. The judges cannot compel the petitioner, who is generally a man of straw, to proceed against his will. They have no means of arriving at the true facts of the case, unless some elector intervenes to take up the abandoned suit, and so the solemn farce proceeds with the inevitable result of bringing the whole affair into contempt, from which the court itself cannot altogether escape.

The proceedings in connection with the recent elections in the Province of Ontario disclose a condition of things which should not be allowed to continue as they are, unless the people are content to forfeit all claim for political integrity. Out of about ninety contested elections nearly seventy-seven protests were filed, of which about thirty have been set down for trial, it being the general belief that the "sawing off" process will dispose of the rest. It is evident, therefore, that either the electorate are hopelessly corrupt, or else that our method of dealing with corrupt practices is worse than useless. No one will believe that in seventy constituencies in Ontario corrupt practices prevailed to such an extent as to call for the intervention of the courts, though, as already pointed out, the fact that nearly forty out of the seventy petitions have been practically dropped is no proof that such practices have not prevailed to a greater extent than is at all to our credit. It would be interesting to ascertain in how many cases the contestants would themselves have put up the deposit, and made themselves liable for the costs of fighting the petition, if no outside interference had taken place. Those who framed the legislation which placed the trial of contested elections in the hands of the judges instead of a partisan committee certainly never contemplated the possibility of their action being the means of placing a fresh weapon at the disposal of party managers, who appear, in zeal for their party, to lose sight of what is due to the country. Either the filing of petitions was necessary in consequence of prevailing

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corruption, in which case they should not have been withdrawn, or the alleg tions contained in them are a libel upon the electors, in which case they shou not have been filed. Nor can party leaders any more than party manage escape responsibility for this condition of affairs.

It is said as to the recent Ontario elections that the reason why a numb of these petitions were filed was because the opponents of the Government h now taken the ground that election constables have no right to vote. Th right has been exercised for many years without question, and the contenti against it has not much merit, and the arguments in favour of the practi seem to be unassailable. But, after all, this only introduces us to anoth symptom of the disease to which we are calling attention, for we find a corre ponding number of petitions filed on the Government side. It would only reasonable that the latter should be in an equally good position when the tu comes for a "saw-off."

Now as to the remedy for these evils. The first and most effective wou be for the leaders of parties to set their faces against any active interferen in such matters, and allow those personally interested to fight their ow battles, in which case the amount of the deposit, and subsequent liabiliti would be a sufficient deterrent against vexatious proceedings. Secondly, that clause of the statutes, both Provincial and Dominion, which leaves t withdrawal of the petition at the discretion of the judge, is really inoperati against abuse, there being no means by which the judge can tell whether t withdrawal is the result of collusion, or of a corrupt arrangement between t parties, enact that the deposit shall be absolutely forfeited to the Crow unless, within a reasonable time, the case is not only brought to trial but pr ceeded with until the judge is satisfied as to the decision which ought to arrived at. Some better remedy may be suggested by those conversant wi the trial of controverted elections, but that some remedy should be found f such an abuse of the functions of the Courts as has recently arisen must apparent to all who have any regard for purity of election, or respect for t law. Possibly a more effective remedy than those suggested might be require a petitioner with his petition to file a statement, particularizing son definite acts of corruption, or stating other reasons for voiding the election, be vouched for by the oath of the petitioner, but even this would be attend with practical difficulties.

The field which is opened up for discussion is a broad one, and a full co sideration would introduce matters political, which a law journal mig not care to take up, but the above is given as food for thought.

REPORTS AND NOTES OF CASES

Privy Council—England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA *v.* ATTORNEYS-GENERAL FOR ONTARIO, QUEBEC AND NOVA SCOTIA.

(THE FISHERIES CASE.)

Before the Lord Chancellor, Lords Herschell, Watson, Macnaghten, Morris, Shand and Davey, and Sir Henry DeVilliers.

Constitutional law—Dominion and Provincial rights—B. N. Act, s. 91—R.S.C. chaps. 92 and 95—R.S.O. c. 24—Rivers and streams—Harbours—Fisheries.

Appeal from the judgment of the Supreme Court of Canada, reported in 26 S.C.R. 444.

Held, 1. There is no presumption that because legislative jurisdiction is vested in the Dominion, proprietary rights are therefore transferred to the Dominion.

2. The beds of rivers and other waters, whether navigable or not, except public harbours, are vested in the Crown in right of the provinces in which the same are situate.

3. Public harbours belong to the Dominion.

4. The B.N.A. Act, s. 91, does not convey to the Dominion any proprietary rights in relation to fisheries, but the Dominion has power to impose a tax by way of license as a condition of the right to fish.

5. Sec. 4 of R.S.C. c. 95, is ultra vires, and sec. 47 of R.S.O. c. 24, is intra vires.

6. The enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Parliament, and is ultra vires of a Provincial legislature.

7. The provinces may declare the conditions upon which fishery leases or licenses may be granted, and may deal with proprietary rights in fisheries.

8. R.S.C. c. 92, is intra vires.

[LONDON, June, 1898

The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada various questions relating to the property, rights and legislative jurisdiction of the Dominion of Canada and the Provinces respectively in relation to rivers, lakes, harbours, navigation, fisheries and other cognate subjects. These questions were as follows:

1. Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several Provinces, and not granted before Confederation, become under the British North America Act the property of the Dominion, or the property of the Province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly

and immediately connected with the sea coast and waters not so connected, between other waters and waters separating (and so far as they do separat two or more provinces of the Dominion from one another or between oth waters and waters separating (and so far as they do separate) the Domini from the territory of a foreign nation?

2. Is the Act of the Dominion Parliament, R.S.O. c. 92, intituled "An A respecting certain works constructed in or over navigable waters," an Act wh the Dominion Parliament had jurisdiction to pass either in whole or in pa

3. If not, in case the bed and banks of a lake or navigable river belong a Province, and the Province makes a grant of land extending into the lak river for the purpose of there being built thereon a wharf, warehouse or like, has the grantee a right to build thereon accordingly, subject to the w not interfering with the navigation of the lake or river?

4. In case the bed of a public harbour or any portion of the bed public harbour at the time of Confederation had not been granted by Crown, has the Province a like jurisdiction in regard to the making a gra and for the purpose in preceding paragraph stated, subject to not the interfering with navigation, or other full use of the harbour as a harbour, subject to any Dominion legislation within the competence of the Domi Parliament?

5. Had riparian proprietors before Confederation an exclusive righ fishing in non-navigable lakes, rivers, streams, and waters, the beds of wh had been granted to them by the Crown?

6. Has the Dominion Parliament jurisdiction to authorize the giving lease, license or otherwise, to lessees, licensees or other grantees, the right fishing in such waters as mentioned in the last question, or any and which them?

7. Has the Dominion Parliament exclusive jurisdiction to authorize giving by lease, license or otherwise, to lessees, licensees or other grantees, right of fishing in such waters as mentioned in the last question, or any which of them?

8. Has the Dominion Parliament such jurisdiction as regards navigabl non-navigable waters, the beds and banks of which are assigned to Provinces respectively under the British North America Act, if any such so assigned?

9. If the Dominion Parliament has such jurisdiction as mentioned in preceding three questions, has a Provincial Legislature jurisdiction for the pose of Provincial revenue or otherwise to require the Dominion le licensee or other grantee to take out a Provincial license also?

10. Has the Dominion Parliament jurisdiction to pass section 4 of Revised Statutes of Canada, chapter 95, intituled "An Act respecting eries and Fishing," or any other of the provisions of the said Act, or any which of such several sections, or any and what parts thereof respectively

11. Had the Dominion Parliament jurisdiction to pass section 4 of Revised Statutes of Canada, chapter 95, intituled "An Act respecting eries and Fishing," or any other of the provisions of the said Act, so fa

these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

12. If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

13. Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled "An Act respecting the sale and management of Public Lands," and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any, and which of such several sections, or any and what parts thereof respectively?

14. Had the Legislature of Quebec jurisdiction to enact sections 1,375 to 1,378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

15. Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the Province, subject to, and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence.

16. Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in, or filling up of navigable waters?

17. Had the riparian proprietors before Confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

The Supreme Court having answered some of the questions adversely to the Dominion and some adversely to the provinces, both parties appealed.

C. Robinson, Q.C., *R. B. Haldane*, Q.C., and *D. B. McTavish*, Q.C., for the Dominion *Edward Blake*, Q.C., *Æmelius Irving*, Q.C., and *J. M. Clark*, for the Province of Ontario. *Coward* and *Cannon*, for the Province of Quebec. *J. W. Longley*, Q.C., and *Coward*, for Nova Scotia.

The judgment of their Lordships was delivered by

The LORD CHANCELLOR.—Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer

therefore to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion legislature, for example affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada. With these preliminary observations their Lordships proceed to consider the questions submitted to them.

The first of these is whether the beds of all lakes, rivers, public harbours and other waters, or any, and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, became under the British North American Act the property of the Dominion.

It is necessary to deal with the several subject matters referred to, separately, though the answer as to each of them depends mainly on the construction of the third schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects numbered 1 to 10. The 5th of these is "Rivers and Lake Improvements." The word "Rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted, the whole of the rivers so vested were transferred from the province to the Dominion. It is contended on the other hand that nothing more was transferred than the improvements of the provincial rivers, that is to say only public works which had been effected and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions; upon the whole their Lordships after careful consideration have arrived at the conclusion that the Court below was right and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were

transferred and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and the provincial rights respectively. Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion, but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified therefore in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour," on which public works had been executed, became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green*, 6 S.C.R. 707, where it was held that the foreshore between high and low watermark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "Public Harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would in their judgment be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*, 6 S.C.R. 707 that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If for example it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are other cases in which, in their Lordships' opinion it would be equally clear that it did not form part of it.

Their Lordships pass now to the questions relating to fisheries and fishing rights. Their Lordships are of opinion that the ninety-first section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the

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heading "Sea Coast and Inland Fisheries" in section ninety-one. What proprietary rights in relation to fisheries were previously vested in private i viduals or in the provinces respectively, remained untouched by that en ment. Whatever grants might previously have been lawfully made by provinces in virtue of their proprietary rights could lawfully be made after enactment came into force. At the same time it must be remembered that power to legislate in relation to fisheries does necessarily to a certain ex enable the legislature so empowered to affect proprietary rights. An en ment, for example, prescribing the times of the year during which fishing be allowed, or the instruments which may be employed for the purpose (wh was admitted the Dominion legislature was empowered to pass) might seriously touch the exercise of proprietary rights, and the extent, character scope of such legislation is left entirely to the Dominion legislature. suggestion that the power might be abused so as to amount to a practical fiscation of property does not warrant the imposition by the Courts of limit upon the absolute power of legislation conferred. The supreme le lative power in relation to any subject matter is always capable of abuse, it is not to be assumed that it will be improperly used; if it is, the remedy is an appeal to those by whom the legislature is elected. If, howe the legislature purports to confer upon others proprietary rights, where possesses none itself, that in their Lordships' opinion is not an exercise of legislative jurisdiction conferred by section ninety-one. If the contrary held it would follow that the Dominion might practically transfer to it property which has by the British North America Act been left to the vinces, and not vested in it.

In addition, however, to the legislative power conferred by the twe item of section ninety-one, the fourth item of that section confers upon Parliament of Canada the power of raising money by any mode or system taxation. Their Lordships think it is impossible to exclude as not wit this power the provision imposing a tax by way of license as a condition of right to fish. It is true that by virtue of s. 92 the provincial legislature impose the obligation to obtain a license, in order to raise a revenue for vincial purposes, but this cannot in their Lordships' opinion derogate from taxing power of the Dominion Parliament to which they have already cal attention. Their Lordships are quite sensible of the possible inconveniences which attention was called in the course of the arguments, which might arise fr the exercise of the right of imposing taxation in respect of the same subj matter, and within the same area by different authorities. They have no dou however, that these would be obviated in practice by the good sense of legislatures concerned.

It follows from what has been said that in so far as section 4 of Revised Statutes of Canada, chapter 95, empowers the grant of fishery lea conferring an exclusive right to fish in property belonging not to the Domini but to the Provinces, it was not within the jurisdiction of the Dominion Par ment to pass it. This was the only section of the Act which was impeached the course of the argument, but the subsidiary provisions in so far as they

intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers and lakes were vested.

The sections of the Ontario Act of 1892, entitled "An Act for the protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also, in so far as it is not inconsistent with the Dominion legislation.

By section 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the province, "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereinafter enumerated." The 12th of them is "Sea Coast and Inland Fisheries."

The earlier part of this section, read in connection with the words beginning "and for greater certainty," appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of the provincial legislature under section 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever therefore a matter is within one of these specified classes legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the Judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word "exclusively." It would authorize for example the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of *The Attorney-General of Canada* v. *The Attorney-General of Ontario* that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and civil rights," although it

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was of such a nature that it would be a suitable ancillary provision t brankruptcy law. But the ground of this decision was that the law in q tion did not fall within the class " Bankruptcy and Insolvency " in the sens which those words were used in section 91.

For these reasons their Lordships feel constrained to hold that the en ment of fishery regulations and restrictions is within the exclusive compete of the Dominion legislature, and is not within the legislative powers of pro cial legislatures.

But whilst in their Lordships' opinion all restrictions or limitations which public rights of fishing are sought to be limited or controlled can be subject of Dominion legislation only, it does not follow that the legislatio provincial legislatures is incompetent merely because it may have relatio fisheries. For example, provisions prescribing the mode in which a pri fishery is to be conveyed or otherwise disposed of, and the rights of succes in respect of it would be properly treated as falling under the hea " Property and civil rights " within section 92, and not as in the class " F eries " within the meaning of section 91. So, too, the terms and conditi upon which the fisheries which are the property of the province may granted, leased or otherwise disposed of, and the rights which consiste with any general regulations respecting fisheries enacted by the Domi Parliament may be conferred therein appear proper subject for provin legislation, either under class 5 of section 92." " The management and of public lands " or under the class " Property and civil rights." Such legi tion deals directly with property, its disposal and the rights to be enjoye respect of it, and was not in their Lordships' opinion intended to be within scope of the class " Fisheries " as that word is used in section 92.

The various provisions of the Ontario Act of 1892 were not minutely cussed before their Lordships, nor have they the information before t which would enable them to give a definite and certain answer as to every of the sections in question. The views however which they have expres and the dividing line they have indicated will they apprehend afford the m of determining upon the validity of any particular provision or the li within which its operation may be upheld, for it is to be observed that sec 1 of the Act limits its operation to " fishing in waters and to waters over c respect of which the legislature of this province has authority to legislat the purpose of this Act." Secs. 1375, 1376, and the 1st sub. s. of 1377 o Revised Statutes of Quebec afford good illustrations of legislation such as t Lordships regard as within the functions of a provincial legislature.

Their Lordships entertain no doubt that the Dominion Parliament jurisdiction to pass the Act intituled " An act respecting certain " works structed in or over navigable waters." It is in their opinion clearly legisla relating to " navigation."

Their Lordships must decline to answer the last question submitted a the rights of riparian proprietors. These proprietors are not parties to litigation or represented before their Lordships and accordingly their L ships do not think it proper when determining the respective rights and j dictions of the Dominion and Provincial Legislatures to express an opi upon the extent of the rights possessed by riparian proprietors.

Dominion of Canada.

SUPREME COURT.

Ontario.] MCKENZIE *v.* BUILDING & LOAN ASSOCIATION. [May 6.

Mortgage—Leasehold—Assignment of equity of redemption—Acquisition by assignee of reversion—Priority.

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emett* v. *Quinn*, 7 O. A. R. 306, distinguished. Judgment of the Court of Appeal, 24 O. A. R. 599, affirmed. Appeal dismissed with costs.

Armour, Q.C., and *Saunders* for appellant. *Scott*, Q.C., and *Alan Cassels* for respondents.

Ontario.] MILLER *v.* HAMILTON POLICE FUND. [May 14.

Benefit society—Rules—Construction—Suspension of payment.

In 1889 the Police force of Hamilton established a benefit fund to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows :—" No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand ($8,000) dollars."

Held, that in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, and was payable as soon as the amount was realized. Appeal allowed with costs.

Watson, Q.C., for appellant. *Teetzel*, Q.C., for respondents.

Ontario.] BAIN *v.* ANDERSON [May 14.

Master and servant—Contract of hiring—Duration of service—Evidence—Dismissal—Notice—Assuming jurisdiction.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold, the foreman, who was engaged by the year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain, his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

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Held, affirming the judgment of the Court of Appeal (24 O. A. 296, whic reversed that of Meredith, C.J. at the trial, 27 O. R. 369), that as it appeare that the foreman knew that the business before the sale had been losing mone and could not be kept going without reduction of expenses and salaries ; a he had been informed that the contracts with the employees had not bee assumed by the purchaser ; and as upon his own evidence there was no hirin for any definite period, but merely a temporary arrangement until the pu chaser should have time to consider the changes to be made—the forema had no claim for damages and his action was rightly dismissed.

Where the jurisdiction of the Supreme Court to entertain an appeal doubtful, the Court may assume jurisdiction when it has been decided that th appeal on the merits must be dismissed. *Braid* v. *Great Western Railway Co* 1 Moo. P. C. N. S. 101 followed.

By 60-61 Vict., c. 34, s. 1, s.-s. (c), no appeal lies from judgments of th Court of Appeal for Ontario unless the amount in controversy *in the appea* exceeds $1,000, and by sub-s. (f), it is the amount demanded and not that recov ered which determines the anount in controversy.

Held, per TASCHEREAU, J., that to reconcile these two subsections, par. (should probably be read as if it meant the amount demanded upon the appea To read it as meaning the amount demanded in the action, which is the con struction the court has put upon R.S.C. c. 135, s. 29 (2) relating to appeal from Quebec, would seem to be contrary to the intention of Parliament.

Laberge v. *Equitable Ins. Co.*, 24 S.C.R. 59, distinguished. Appeal dis missed with costs.

Gibbons, Q.C., for appellant. *S. H. Blake*, Q.C. and *Osler*, Q.C., fo respondents.

Ontario.] OSTROM *v.* SILLS. [May 1

Adjoining proprietors of land—Different levels—Injury by surface water— Easement.

Ostrom and Sills were adjoining proprietors of land in the village o Frankfort, Ont., that of Ostrom being situate on a higher level than th other. In 1875 improvements were made to a drain discharging upon th premises of Sills, and a culvert was made connecting with it. In 1887 Sill erected a building on his land, and cut off the wall of the culvert which pro jected over the line of the street, which resulted in the flow of water throug it being stopped and backing up on the land of Ostrom, who brought a action against Sills for the damage caused thereby.

Held, that Sills having the right to cut off the part of the culvert whic projected over his land, was not liable to Ostrom for the damage so caused the remedy of the latter, if he had any, being against the municipality for no properly maintaining the drain. Appeal dismissed with costs.

C. J. Holman and *E. Gus Porter*, for appellants. *Clute*, Q.C., and *Williams*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] WEST HURON PROVINCIAL ELECTION. [March 26.

Ballots—Recount—Ballot initialed by ballot clerk instead of D.R.O.—Mutilated ballot—Words written on ballot—Presumption.

Cross appeals by the candidates, J. T. Garrow and Joseph Beck, from the decision of the Judge of the County Court of the County of Huron, on a recount held before him.

Held, 1. A ballot will not be rejected because it is initialed by the poll clerk, instead of by the deputy returning officer, when the whole number of ballots, as counted, agree with the number of names of persons marked in the poll book as having received ballots, the handwriting of the initials corresponding with the handwriting of the signature of the poll clerk.

2. A ballot, from which a strip, having the official number upon it, which is an integral part of the ballot, is torn off and missing, will be presumed to be mutilated by the voter, and the vote cannot be counted.

3. A ballot with the word "vote" written after the candidates name, disallowed.

4. A ballot with the word "Jos." written before Beck, the candidate's name, disallowed.

5. A ballot marked for the candidate Beck, but having the words "for Beck" written on the back of the ballot, disallowed.

In reference to the last three cases, above mentioned, the learned Judge said; "There is nothing to show that the writing was not placed on the back or front of the ballot by the voter himself. The presumption is that it is his writing. The whole subject of ballot marking is well worthy of examination by the full Court of Appeal, with the view of laying down some clear principle. The course of decision in this country has, however, been to disallow ballots marked as above. I refer to the *North Victoria Case*, H.E.C. 681, where it is said: 'The voter besides putting the cross for the respondent, has written the respondent's name in full. That is certainly bad, for by that writing the voter may be identified. I cannot say; it may not have been put there for that purpose,' and the same principle is applied in *Woodward* v. *Sarsons*, L.R. 10 C.P. 733. The handwriting of the voter would, in many instances, even if found in a single word or part of a word, furnish a very potent means of identifying him."

Aylesworth, Q.C., for Garrow. *Wallace Nesbitt*, *Masten* and *W. D. McPherson*, for Beck.

Maclennan, J.A.] WEST ELGIN PROVINCIAL ELECTION. [April 12.

Ballots—Recount—Mutilated ballot—Ballot marked for both candidates—Words written on ballot—Ballot marked in wrong place—Imperfect cross—Spoiled ballots.

There was a recount of votes by the Judge of the County Court of the

County of Elgin, from which both candidates (McNish and McDiarm appealed

MACLENNAN, J. A. :—The form of ballot used was identical with that the schedule of the Election Act, except that a scroll about one-eighth of inch wide was used instead of the plain lines running from left to right in form. The upright lines separating the numbers from the names were t plain lines, similar to those in the form, and bore the same colours as names of candidates respectively. Fifteen of these twenty ballots were mar in the division containing McDiarmid's number, to the left of the line sepa ing the numbers from the name, and the other five were similarly marked the division containing MacNish's number. They were all counted by learned judge, and his decision is objected to on behalf of MacNish. ground of objection is that, not being marked in the division containing name, they are void, as not complying with s. 103 of the Act, which dir that the cross be placed by the voter on the right hand side, opposite the na of the candidate for whom he desires to vote, or at any other place wit the division which contains the name of such a candidate.

The question does not concern the right to vote, but only the pro method of doing so. The legislature has given certain directions for mark the ballot. They are intended for all classes of voters, including some are not accustomed to the use of paper and pencil and some who dull and unintelligent, and yet who have as good a right to vote as most intelligent. Therefore, if a ballot is so marked that no one looking a can have any doubt for which candidate the vote was intended, and if th has been a compliance with the provisions of the Act according to any fair reasonable construction of it, the vote ought to be allowed. I think that is result of the authorities, both here and in England : *Cirencester*, 4 O'M. & 196 ; *Woodward* v. *Sarsons*, L.R. 10 C.P. 733 ; *Thornbury*, 16 Q.B.D. 7 *Phillips* v. *Goff*, 17 Q.B.D. 805 ; *North Victoria*, H.E.C. at p. 680 ; *Bothw* 8 S C.R. 676.

In the present case the question is whether twenty persons who had undoubted right to vote, and who desired and intended and endeavoured to so, have nevertheless failed in their attempt. There are two methods of ma ing the ballot allowed by s. 103. The cross may be placed at the right-h side, opposite to the name of the candidate intended to be voted for, or it m be placed in any other place within the division containing his name. Th are really not two alternative methods, because the second method includes first. Are these ballots marked within the division containing a candida name? If we say, looking at the ballot which was here used, that the na of the candidate is in one division and his number in another, then th marks are not in the division containing the name, but in that containing number. But I think it clear that these are not the divisions intended by statute. The dividing line between the name and the number is not essent There is no need whatever for a separating line between a candidate's na and his number, and the ballot would be perfectly good without it. Sect 69, sub-sec. 2, requires the names to be arranged alphabetically on the ballot, a sub-sec. 3 directs the number and name of each to be printed in ink of differ

colours. Therefore, the number is something belonging to the candidate, and not something distinct. There is no direction where the number is to be placed, and it might be placed anywhere near the name, before or after it, or above or under it. It is different with the names of the candidates. They must be separated from each other. Each must have a separate part of the ballot paper for itself, and must therefore be in a separate division. Accordingly, we find the form in the schedule divided by lines drawn from right to left, with as many divieions as there are candidates. I think these are the divisions intended by the statute, and that the divisions containing the numbers are mere subdivisions of the divisions containing the names. In other words, it is the same division of the ballot paper which contains each candidate's name and number. It would be a strange construction of the statute which would hold that, on a ballot from which the immaterial and useless upright lines were omitted, a cross near the number or even to the left of it would be good, as it clearly would be, but that on a ballot containing those lines a cross so placed would be bad ; and yet, a ballot in either form would be good, and might be used with propriety in either election. I think a construction leading to such a result ought not to be adopted, if it can be avoided. In my opinion, there is a very plain sense in which, notwithstanding the upright line, the space containing the number may be regarded as a part of the division of the ballot containing the candidate's name, and therefore I am bound to hold that it is so, and to affirm the validity of ballots marked within that space. I therefore think that the learned judge's decision was quite right, and that those twenty votes were properly allowed and counted by him.

There is another ballot, No. 117, which was rejected both by the deputy returning officer and by the learned judge, presumably on account of having a considerable portion of the blank part on the right-hand side removed, a section of equal width from top to bottom, and about three-tenths of the whole width of the original paper. The part removed had none of the printed matter of the ballot upon it, except perhaps a portion of the lines from left to right separating the names of the candidates. In other respects this ballot is perfect, and properly marked for McDiarmid. The argument which was strongly urged against its allowance was that the voter might carry away with him the part removed, and use it to show that he had voted for McDiarmid. I have hesitated a great deal over this ballot, but, upon the whole, I do not think there is anything in the Act requiring me to reject it. Section 112 (3) requires ballots to be rejected on which anything in addition to the printed number and the deputy returning officer's name or initials is written or marked. by which the voter can be identified. There is nothing of that kind here, and I do not feel at liberty to extend the language of the legislature so as to include such a case as this within the prohibition, and thereby to disfranchise the voter, who has in every respect marked his ballot distinctly and properly: In *Thornbury*, 16 Q.B.D. at p. 753. Section 103 requires the voter to mark and to fold and to return to the deputy returning officer the very ballot paper which has been given to him, and by s. 105 no person who has received one is to take it away out of the polling place. It might be argued that he is required to return the whole ballot paper, and not merely a part of it, and that the prohibi-

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tion of taking it away extends to every part of the paper. It may perhaps be inferred from the fact that the deputy returning officer refused to count the vote, that he did so because he knew he had not given out any ballot paper so much smaller than all the others as this, and therefore that it was the voter who had torn or cut a piece off it. But for that, it would be an assumption that there had been any part removed, or, if there had, that it had been done by the voter, or that it had not been in that condition when given to him. It is still a perfect ballot, properly marked, and it is only by comparison with the other ballot papers that the inference can be drawn that any part of it had been removed. Now, section 109 seems to be very material to this question. That provides for the case of a voter spoiling his paper, and it is only when it has been dealt with so "that it cannot be conveniently used as a ballot paper" that it is spoiled, and ought to be delivered up and a new one procured. This voter may by inadvertence have marked it wrongly in the first place, and, immediately perceiving that, may have torn or cut off the margin on which he had placed his mark. He then finds that it can still be conveniently used as a ballot paper, and he does make use of it. I think s. 109 warrants the conclusion that he might do so. This ballot is not like that which was before my brother Osler in the *West Huron* case, in which a part was torn off, and which was disallowed by him. In that case the part torn off was an essential part of the ballot paper, namely, that on which the printed number had been. I think the proper conclusion is that this ballot ought not to have been rejected, and ought to be counted for McDiarmid.

Nine ballots were questioned as having other marks thereon besides the cross. No. 3484 was well marked for McDiarmid, whose name was uppermost on the paper, and there were, besides the proper mark, two other small crosses near the upper margin of the paper, outside of the line. It was disallowed by the learned judge, but I think that was wrong, and that it should be allowed for McDiarmid. Nos. 3946 and 4858 were both marked for McDiarmid, but there was a straight stroke on MacNish's division. The learned judge disallowed them, but, I think, wrongly. They should be allowed for McDiarmid. No. 5350 was well marked for MacNish, but in McDiarmid's field there was also a cross, but carefully obliterated with a pencil. I think it was rightly allowed for MacNish by the learned judge. Nos. 6564 and 7735 were allowed, the first for McDiarmid and the other for MacNish, and I think rightly. No. 8508 was well marked for McDiarmid, but with two obscure lines opposite to MacNish's name, lying very close together, almost coincident. It was counted by the deputy returning officer, but rejected by the learned judge. I cannot say the lines do not cross each other, and therefore I cannot disturb his finding. No. 8491 is like the last in every respect, and was rejected both by the deputy returning officer and the learned judge. I cannot say they were wrong.

Four ballots were questioned for having names or initials upon them other than those of the deputy returning officer. No. 1306 has the name MacNish on the face, in pencil, in that candidate's division, as well as a proper cross. It was rejected by the learned judge. I think it should have been allowed. I am unable to see how the voter could (not, might possibly) thereby

be identified: *Cirencester*, 4 O'M. & H. 196, per Hawkins, J. No. 7369 was well marked for MacNish, but had the words "Mr. MacNish, West Elgin," in pencil, on the back. I think it was properly allowed by the learned judge. No. 7509 was properly marked for MacNish, and had the initials "D.F." on the back, as well as those of the deputy returning officer. It was allowed by both the deputy returning officer and the learned judge, and I think rightly. No. 7582 was properly marked for McDiarmid, but had the name "John Cains," in pencil, on the back, besides the initials of the deputy returning officer. It was rejected both by the deputy returning officer and the learned judge. It may have been because there was a voter of that name on the list. I cannot say it was not rightly rejected.

There were three cases of alleged imperfect and doubtful crosses. Of these 5867 and 7165 were, I think, rightly allowed for MacNish. The first was a sprawling sort of a cross, but a cross nevertheless. The other was a cross, one of the lines being indistinct at and for a very short distance on both sides of the intersection, but still quite visible. No. 6145 was an unusually large cross, the arms extending into McDiarmid's field, but the intersection wholly within McNish's division. It was rejected both by the deputy returning officer and the learned judge. I think it should have been counted for MacNish.

The remaining ballot is no. 8176. The learned judge thinks this ballot was found in the spoiled ballots' envelope, but he says that, looking at the ballot paper account and all the documents which were before him, he thinks it was placed in a wrong envelope by mistake, and he allowed it. It is well marked for McDiarmid, but it is like number 5350, mentioned above, in having a cross in MacNish's field with evident obliteration marks over it. I think the learned judge rightly allowed it, if it was not a spoiled ballot. I have no means of reviewing his conclusion that it was not a spoiled ballot, inasmuch as, this appeal being a limited one, the Act does not authorize the transmission to me of anything but the ballot papers which are the subject of appeal, together with a notice of appeal and a certificate of the learned judge's finding.

The result is that Mr. McDiarmid has a majority of one. No costs of the appeal.

E. F. B. Johnston, Q.C., and *Aylesworth*, Q.C., for Donald MacNish. *Wallace Nesbitt* and *T. W. Crothers*, for Finlay G. McDiarmid.

Maclennan, J.A.] SOUTH PERTH PROVINCIAL ELECTION. [March 26.

Ballots—Re-count—Ballot numbered by D.R.O.—Ballot marked in wrong place—Defective form of ballot—Ambiguity.

There was a re-count of votes before the Judge of the County Court of the County of Perth, from which two of the candidates (Moscrip and Monteith) appealed.

MACLENNAN, J.A.—The objection to the ballots cast at No. 3, Downie, and No. 3, Hibbert, was that a number had been placed on the back of each ballot by the deputy returning officer, in pencil. The learned judge disallowed the objection, and I think he was clearly right in doing so, inasmuch as s. 112

(3) expressly provides that "no word or mark written or made or omitted t be written or made by the deputy returning officer on a ballot paper sha void the same."

I have examined each one of the whole 112 ballots which were questione and specially passed upon by the learned judge, and I agree with his decisio thereon in each case, and generally with his reasons, with the exception of 1 ballots allowed for Monteith, and with regard to which, with great respect, have been unable to come to the same conclusion. I find myself obliged t come to the conclusion that all these ballots are either marked for the cand date Frame, or are void for uncertainty, and so cannot be counted for Monteit as they have been by the learned judge. The difficulty is occasioned by fault in the printing of the ballot papers. There were three candidate Frame, Monteith, and Moscrip, and their names were arranged in alphabetic order, Monteith's being in the centre division. Frame chose black as h colour, Monteith, blue, and Moscrip, red; and it is said, and I suppose trul that the ballot had to pass through the printing press at least three time And in all these fourteen cases, Monteith's surname, that is, the one printed large type, was placed either upon or above the line separating his divisio from Frame's, instead of being placed wholly within the division intended f it. The Christian name and surname, however, in smaller type, and the add tion of each candidate, are wholly within his own division. In two of suc cases, in which the cross was placed at the right hand of the large surnam but a little higher up than exactly opposite to it, the learned judge allowed th votes for Frame; but in the above fourteen cases, where the cross was ver nearly opposite to the large name "Monteith," he allowed it, although in on case it was exactly on the dividing line, and in all the other cases wholly abov it. His reason for doing so is that the voter, having placed his mark opposi to the candidate's name on the right hand side, has complied literally with th Act; and that would be so but for the other direction that it may be place anywhere within the division containing the candidate's name. The difficul is that one of Monteith's names is in, or partly in, Frame's division, and tha persons intending to vote for the latter are told they may do so by placin their cross anywhere within the division containing the name. When th Legislature speaks of divisions containing the names, and when the form ballot prescribed and used has lines upon it indicating such divisions, I thin it cannot be said that the lines are immaterial, or that they may be disregarde I think a voter intending to vote for Frame, and being told that he would b right if he put his mark anywhere in the division containing his name, migh have marked his ballot exactly as any one of these fourteen which have bee allowed for Monteith. There is one exception from that remark, namel No. 5230, in which the cross is exactly upon the line, and may have bee intended for either one or the other. The learned judge says the dividing lin between Frame's division and Monteith's division must be conceived to b drawn immediately above the surname of the latter; but I think I cannot di regard the fact that there is an actual dividing line upon the ballot, separatin the two divisions, and that every one of the votes in question may in fact hav been intended for Frame, being within the division of the ballot containing h

name, notwithstanding that they are also at the right hand side, and opposite or nearly opposite to Monteith's name, and may have been intended for him. I think those fourteen ballots ought not to have been allowed, and ought to be taken off Mr. Monteith's poll.

The learned judge has not in his certificate stated what he found the majority to be, or in whose favour it was, and I can do no more than to decide that the fourteen ballots above mentioned ought to have been rejected.

I think there should be no costs.

Idington, Q.C., for Moscrip. *Wallace Nesbitt* and *F. H. Thompson*, for Monteith.

From Falconbridge, J.] LANGLEY *v.* MEIR. [June 30.

Insolvency—Assignments and preferences—Landlord and tenant—Rent—Accelleration clause—58 Vict. c. 26, s. 3, sub-s. 1 (O.)—R.S.O. c. 170, s. 34, sub-s. 1.

The above enactment is a restrictive provision, and limits the landlord's lien, even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provisions. *Clarke* v. *Reid*, 27 O.R. 618, overruled. Judgment of FALCONBRIDGE, J., reversed.

Shepley, Q.C., for appellant. *W. Barwick*, for respondent.

From Rose, J.] SPARKS *v.* WOLFF. [June 30.

Will—Construction—Change in law—"Heirs"—14-15 Vict., c. 6—43 Vict. c. 14, s. 2 (O.).

A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage, to his son, "should he be living at the happening of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887.

Held, that [the Act abolishing heirship by primogeniture, 14-15 Vict. c. 6, applied, and that all the brothers and sisters of the son were his "heirs" and entitled to take under this device. *Tylee* v. *Deal*, 19 Gr. 101, and *Baldwin* v. *Kingstone*, 18 A.R. 63, distinguished. Judgment of ROSE, J., reversed.

Armour, Q.C., for appellant. *Osler*, Q.C., for respondent.

From Assessment Court.] [June 30.

IN RE CANADA LIFE ASSURANCE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Life insurance company—Reserve fund—Income—Divisible profits.

The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the company's special Act, as profits among participating policy holders, and not subject to the control or disposition of the company. Judgment of the Assessment Court affirmed.

Bruce, Q.C., for appellants. *Robinson*, Q.C., and *Mackelcan*, Q.C., for respondents.

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From Assessment Court.] [June

IN RE BELL TELEPHONE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Telephone company—Poles, wires, conduits and cal

In assessing for purposes of taxation the poles, wires, conduits and cal of a telephone company the cost of construction or the value as part o going concern is not the test; they must be valued, in the assessment divis in which they happen to be, just as so much dead material to be taken in p ment of a just debt from a solvent debtor. Judgment of the Assessment Co reversed.

Staunton and *Ambrose*, for appellants. *Mackelcan*, Q.C., for respondei

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Armour, C.J., Falconbridge, J., Street, J. [June

KENNEDY *v.* BEAL.

Arbitration Act—Rule 652—Arbitrator selected by the parties.

Upon a proper construction of R.S.O., c. 62, ss. 12 and 35, Rule 652 (not apply in the case of an arbitration ordered by consent in Court, to an a trator selected and agreed on by the parties.

Robinson, Q.C., and *Ryckman*, for plaintiff. *Aylesworth*, Q.C., defendants.

MacMahon, J.] LEGGATT *v.* BROWN. [June

Contract—Consideration in part illegal—Stifling prosecution.

The manager of the business of an insolvent firm was arrested imprisoned on a charge of having procured the firm, while in insolvent cir stances, to transfer certain of its property to another person with inte defraud the creditors of the firm. After he had been released on bail an was made in writing by his wife and her son, to the creditors of the fi pay a certain percentage of their claims, in addition to the dividend to be by the estate of the firm, and to withdraw certain actions and procu abandonment of certain claims, upon certain conditions set out in the one of which was that any creditor accepting the offer, should not ther directly or indirectly, institute or be a party to any action or proceeding a the husband in respect of any matter or thing in any wise connected w affairs or business of the firm. This offer was accepted by the plaintiff number of the other creditors. After it was made, the husband wa charged from custody, the informant, one of the creditors, not appearing, evidence being offered in support of the charge. Promissory notes were wards made by the wife and her son in favour of the creditors for the lated percentage. In an action by one of the creditors upon some of the

Held, that although not stated in express terms, one object of the d ants in making their offer was to procure the stifling of the prosecution charge made against the husband; that it was in accordance with the cluded agreement made by the defendants with the plaintiff and the

creditors, that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given upon the illegal agreement thus entered into, could not be enforced. *Rawlings* v. *Coal Consumers' Association*, 43 L.J.M.C. 111; *Windhill Local Board of Health* v. *Vint*, 45 Ch. D. 351, and *Jones* v. *Merionethshire Permanent Benefit Building Society* (1891) 2 Ch. 587, followed.

Held, also, that as part of the consideration for the agreement was illegal, the whole was bad. *Lound* v. *Grimwade*, 39 Ch. D. at p. 613, referred to.

George Kerr, for plaintiff. *J. E. O'Meara*, for defendant Patterson. *Wyld*, for defendants Altha Ann Brown and J. W. Baker. *Fripp*, for defendant, W. E. Brown.

Rose, J., MacMahon, J.] DANIELS *v.* DANIELS. [June 29.

Chattel mortgage—Renewal statement—Assignment between making and filing—R.S.O., c. 148, s. 18.

A chattel mortgage does not cease to be valid as against creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment.

J. Bicknell and *A. Bicknell*, for plaintiff. *Brewster*, for defendant William Daniels. *S. C. Smoke*, for defendant Stockton.

HIGH COURT OF JUSTICE.

Rose J.] HAWKE *v.* O'NEILL. [June 16.

Jury notice—Striking out—Convenience—Judge in Chambers—Judge at trial

A jury notice should not be struck out by a Judge in Chambers, upon a motion made before the trial, simply upon the ground that the action can be more conveniently tried without a jury; that is a matter which should be left for the consideration of the Judge presiding when the action comes on for trial.

W. H. Wright, for plaintiff. *W. Davidson*, for defendant.

Meredith, C.J., Rose, J., McMahon, J. } ALLEN *v.* ONTARIO AND RAINY RIVER R.W. CO. [June 27.

Company—Contract made by director—Authorization—Informality—Sale of undertaking—Purchase money—Equitable charge upon.

The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and

of his manner of doing it, and vested in him, either tacitly or by direct autl ization, the right and authority to transact the business of the company.

Held, that the plaintiff was entitled to recover from the company the v of his work. *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869, lowed. *Wood* v. *Ontario and Quebec R.W. Co.*, 24 C.P. 334, commented o

The undertaking having been sold by the provisional directors, free o liens and incumbrances, for a certain sum of money, which was paid to th and a portion of which was paid into court under an order in another acti all the provisional directors being parties to this action, and two of them mitting to the order of the Court and being willing that the judgment should be paid out of the fund in Court, an order was made, notwithstand that the purchasers were not parties, directing payment of the plaintiff's and costs, and of the costs of the two directors out of such fund.

W. R. Riddell, for plaintiff. *D. W. Saunders*, for defendant compa *S. H. Blake*, Q.C. and *H. M. Mowat*, for defendant Gorham. *D. McCarthy*, for defendants Burk and Dwyer.

Meredith, C.J., Rose, J. }
McMahon, J. } WARREN *v.* VANNORMAN. [June

Way—Right of—Prescription—Tenant—Slight deviations—Interruption Appeal—Admission of new evidence—Erection of gate across way.

The plaintiff, having omitted to give formal proof of his title at the t was allowed to supply it upon the appeal. Upon plaintiff's assent, the ju ment was varied by awarding to the defendant leave to erect and maintai gate across the end of the way in question. The decision of STREET, J., O.R. 84 affirmed on appeal. *Clendenan* v. *Blatchford*, 15 Q.R. 285, referred

Britton, Q.C., for defendant. *J. A. Hutchinson*, for plaintiff.

Meredith, C.J., Rose, J. }
McMahon, J. } REGINA *v.* LYON [June

Criminal law—Demanding property with menaces—Criminal Code, 1 s. 404—Intent to steal—Evidence.

"Everyone is guilty of an indictable offence and liable to two years prisonment who, with menaces demands from any person, either for himsel for any other person, anything capable of being stolen with intent to steal Criminal Code, 1892, s. 404, The defendant was convicted by a magist of an offence against this enactment. The evidence was that the defend went, as agent for others, to the complainant's abode to collect a debt f him; that the defendant threatened the complainant that if the latter did pay the debt, he would have him arrested; that the defendant deman certain goods, part of which had been sold to the complainant by the defe ant's principals, and on account of which the debt accrued, but upon wh they had no lien or charge; and the complainant, as he swore, being frighte by the threats and conduct of the defendant, acquiesced in the demand for goods, which the defendant took away. The defendant swore that he dema

ed and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this.

Held, MEREDITH, C.J. dissenting, that there was no evidence of intent to steal, and the conviction should be quashed.

Parker, for the defendant. *Cartwright*, Q.C., for the Crown.

Province of New Brunswick.

SUPREME COURT.

Full Court.] QUEEN *v.* PHILLIPS. [June 15.

Peddlers' Act—Sewing machine agent not a peddler.

Defendant was convicted for peddling without a license. The evidence was that he opened a place of business at Sackville for the sale of Singer sewing machines, and that he drove about the adjoining country with a machine in his wagon, soliciting orders. It was also shown that he sold one machine on the road.

Held, that this was not peddling within the meaning of the Peddlers' Act. Conviction ordered to be quashed.

A. P. White, Attorney-General, for the crown. *M. G. Teed*, contra.

Full Court.] CRAWFORD *v.* CITY OF ST. JOHN. [June 1.

Civic voters' list—Neglect to put name on list.

The chamberlain of the city neglected to put plaintiff's name on the civic voters' list after he had paid his taxes, and plaintiff in consequence lost his vote.

Held, that the city was liable for the neglect.

G. A. Belyea and *A. A. Stockton*, Q.C., for plaintiff. *C. N. Skinner*, Q.C., for defendant.

Full Court.] YOUNG *v.* HUBBARD. [June 15.

Replevin—Defendant sued by initial—Bond.

Defendant was sued in replevin by the name of "C. Hubbard," and only one surety signed the plaintiffs' bond to the sheriff.

Held on appeal by defendant that both the writ and the bond were bad. Appeal allowed with costs.

M. G. Teed, in support of appeal. *W. Pugsley*, Q.C., contra.

Full Court.] DURHAM *v.* ST. CROIX SOAP CO. [June 15.

Guessing contest—Value of prize piano—Advertised price—Price obtained at auction.

Defendant offered by advertisement "an $800 Heintzman piano" at the St. John exhibition, to the person guessing nearest to the weight of a cake of soap. Plaintiff claimed she made the nearest guess and brought an action, in which she recovered a verdict for $300. The judges of the contest had passed

over plaintiff's guess, which was in fact the nearest, and decided to sell piano at auction and divide the proceeds among three other persons, who all three guessed another figure. At this auction the piano sold for $300 plaintiff forbade the sale. This was the only evidence offered as to the val the piano, excepting the defendants' advertisement describing the pian above, and by which the latter, on cross-examination, said he meant it worth $800. The trial judge assessed the damages at $300.

Rule to increase the damages refused. TUCK, C.J., dissenting.

E. P. Raymond and *G. D. Hazen*, in support of rule. *L. A. Currey*, contra.

Full Court.] MACPHERSON *v.* SAMET. [Jun

County Court appeal—Costs—Attachment.

An appeal had been allowed with costs from the decision of the County Court setting aside a writ of capias and the service thereof. plaintiff took out the clerk's allocation for the costs and served it upon defendant with a demand for the costs.

Held, on a motion for attachment for non-payment of the costs, that pla iff's remedy was under s. 75 of the County Court Act, which provides the costs "shall be certified and form part of the judgment of the Court bel

Rule refused. But the Court intimated that it did not wish to be un stood as holding that in no case could an attachment be granted for non- ment of the costs of a County Court appeal.

C. E. Duffy, in support of rule.

Full Court.] EX PARTE ISAAC SAMET. [June

Two actions in different Courts on two promissory notes, both overdue u first action was brought.

A capias was issued against the applicant in the York County Court a promissory note for $110, and a few days later another capias was issue the suit of the same plaintiff, out of the City of Fredericton Civil Co against him on a note for $53. Both notes were overdue and owned by plaintiff when the first action was brought. An order nisi for a writ of pr bition was obtained to prohibit the City Court from proceeding in the sec action on the ground that plaintiff could not split up his claim and bring th in different counts.

Held, that the applications could be so brought.

G. W. McCready, for application. *C. E. Duffy*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] REGINA *v.* CLOUTIER. [May 11.

Criminal Code, ss. 22, 552, sub-s. 2, 7—Arrest without warrant—Detention o prisoner.

The prisoner was arrested by the Chief of Police of Winnipeg, at the request of the Chief Constable of Montreal, contained in a telegram which charged him with having, with intent to defraud, by false pretences, at the city of Montreal in the province of Quebec, directly obtained from Doull & Gibson, of Montreal, goods capable of being stolen, of the value of $1,387. A writ of habeas corpus having been issued, the Chief of Police made his return on the day after the arrest, justifying the arrest and detention of the prisoner on two grounds: first, setting out positively that the prisoner had been guilty of the offence charged, and that he had arrested him without a warrant; second, that the prisoner had been charged with committing such offence, and that he, the Chief of Police, believed on reasonable and probable grounds that the offence had been committed by the prisoner, and so believing had arrested and was detaining him without a warrant.

Held, that under ss. 22, 552, sub-s. 2, of the Criminal Code, as amended by 58-59 Vict, c. 40, both clauses of the return were good; also that section 22 operates not merely to enable the officer to defend himself if proceeded against for the arrest, but authorizes the arrest and makes it lawful under the circumstances set up, and the section also applies not only where the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest.

It was contended on behalf of the prisoner that even though lawfully arrested he was now being unlawfully detained, and paragraph (a) at the end of sub-s. 7 of s. 552, was relied upon.

Held, that the last mentioned paragraph, requiring a prisoner who has been apprehended to be brought before a Justice of the Peace before noon o. the day following his arrest, only applies to the offences referred to in sub-s. 7.

The Court enlarged the application for three days, and allowed the prisoner to go on bail in the meantime, but before the expiration of the time, the prisoner was re-arrested and taken to Montreal under a warrant sent up from that city.

Tupper, Q.C., and *Phippen*, for prosecutor. *Howell*, Q.C, for prisoner.

Full Court.] ABELL *v.* CRAIG. [June 27.

Contract—Sale of goods—Condition precedent.

Appeal from the County Court of Glenboro. Defendant gave plaintiffs a written order for a second-hand horse power and threshing machine, "the same to be put in good running order . . . by putting in a set of cylinder spikes." The price was to be $250. After the acceptance of the order and the delivery of the machine, the set of cylinder spikes was put in, and plaintiffs'

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agent made several attempts to put the machinery into good running ord but defendant claimed the condition was broken and returned the machi Plaintiffs then sued for the price agreed on.

Held, affirming the Court below, that the condition of the sale was n satisfied by the putting in of the new spikes, but that plaintiffs were bound put the machine into good running order, and that the appeal from the verdi of the County Court in favour of defendant should be dismissed with costs.

Howell, Q.C., for plaintiffs. *Pitblado*, for defendant.

Full Court.] REGINA *v.* BUCHANAN. [June

Criminal Code, s. 645—Criminal procedure—Interpretation Act, R.S.C., c. s. 7 (4)—"Shall"—Initialling names of witnesses on indictment—Th party assaulted consented to fight immaterial.

Held, on a case reserved for the opinion of the Court,

(1) That the omission of the foreman of the Grand Jury to put h initials opposite the names of the Crown witnesses on the back of the bill indictment, as required by s. 645 of the Criminal Code, 1892, is not fatal to t indictment, and that notwithstanding the language of the Interpretation A R.S C., c. 1, s. 7 (4), the word "shall" in that provision is not imperative the sense that a failure to observe the direction will invalidate the proceedin *O'Connell* v. *The Queen*, 11 C. & F. 155; *Queen* v. *Townsend*, 28 N.S. 4 followed.

(2) That the crime of assault may be committed, although the party a saulted may have consented to fight. *Regina* v. *Coney*, 8 Q.B.D 534, followe

Conviction affirmed.

Full Court.] CASE *v.* BARTLETT. [June

Registry Act, R.S.M., c. 135, ss. 68, 69, 72—Registered judgments—Unregister prior charge—Priority—56 Vict. (M.), c. 17—57 Vict. (M.), c. 14.

Appeal from the order of DUBUC, J. noted ante p. 281, dismissing a moti by holders of certain registered judgments against the Master's order, maki them subsequent incumbrancers in his office, and giving priority to t plaintiffs' unregistered agreement for a lien or charge on the defendant's lan for the price of machinery bought from the plaintiffs. The certificates judgment had been registered after the execution and delivery of the machi agreement. By 56 Vict., c. 17, the document under which the plainti claimed could not be registered, and by 57 Vict., c. 14, every document of t kind is made void as against any person claiming under a registered instr ment, irrespective of any notice, actual or constructive.

Held, that notwithstanding these statutes and ss. 68, 69 and 72 of t Registry Act, the registration of the judgments bound only the interest estate the debtor then had in the lands which was subject to the charge existi in favour of the plaintiffs, and that the Master was right in making the app lants subsequent incumbrancers. Appeal dismissed with costs.

Mulock, Q.C., for plaintiffs. *Howell*, Q.C., and *Mathers*, for judgme creditors.

Province of British Columbia.

SUPREME COURT.

Irving, J.] IN RE MCDONALD BROTHERS. [May 11.

Certiorari—Sufficiency of description in conviction.

Application for certiorari and to quash a conviction by the Police Magistrate of Vancouver for an infraction of a by-law which prohibited livery stable keepers from hiring conveyances to notoriously loose characters. The conviction was of McDonald (without any Christian name) for the offence recited to have been committed by McDonald Brothers. Joint and several offences were also recited as having been committed by McDonald Brothers. The fine inflicted was directed to be paid by McDonald Brothers.

Held, following *Regina* v. *Harrison*, 8 T.R. 508, that if the conviction is for several offences, each guilty person must be specifically named in the conviction, and the omission to set out the Christian name is fatal.

Macdonell, for McDonald Brothers. *Hammersley*, for City of Vancouver.

Irving, J.] COX *v.* CUNNINGHAM. [June 10.

Ca. re.—Arrest before judgment—Foreign debt.

The defendant in this case came from Nova Scotia, and was on his way to the Yukon with merchandise to sell there when he was arrested at Vancouver on a ca. re. at the instance of the plaintiff who resided in Nova Scotia. This was an application for his discharge on the ground that the Act providing for arrest by ca. re. did not contemplate the arrest, by a foreign creditor, of a foreigner merely passing through this country, and at least there was a discretion which should be exercised in the defendant's favour, inasmuch as the fact of his being a foreigner and only passing through the country rebutted the assumption ordinarily existing that he was leaving the country with intent to defraud creditors.

Held, that a foreigner under the above circumstances is in no different position from a resident debtor as regards his arrest under ca. re.

Russell, for plaintiff. *Macdonell*, for defendants.

NOTE.—The defendant was subsequent to judgment discharged from custody, he having shown on examination that he had no means to satisfy the debt and the statute providing for discharge in such a case.

McColl, J.] REGINA *v.* NICOL. [June 13.

Criminal libel—Time to apply for commission to take evidence of witnesses abroad.

On motion made on behalf of defendant upon close of the pleadings in which a plea of justification had been entered, motion was made at the trial on behalf of defendant for a commission to take evidence of witnesses in England in support of the plea of justification. It was objected on behalf of the Crown that as the parties had come down to trial the application was too late.

Held, that defendant was entitled to take every moment to consider

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whether he would put in a plea of justification, and as the evidence prop to be taken under the commission was only as to that plea which had been entered, the application could not have been made before.

Chas. Wilson, Q.C., and *R. Cassidy*, for Crown. *A. Martin*, for defen

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Walkem, J.] [Jun

KLONDIKE RESEARCH SYNDICATE *v.* CONRADI WATERHOUSE.

Injunction—Specific performance.

The defendant company on 11th of March last contracted to conve stern wheel steamer of the plaintiff syndicate from England to St. Mich Alaska, on the "S. S. Garonne." The plaintiffs, alleging that the owners in treaty for sale of the "Garonne" to the U. S. Government, applie parte for an injunction to restrain the defendant company from transferrin steamer "Garonne" to any person previous to her voyage to St. Michaels appeared from the evidence that the stern wheel steamer then swung ab the "Garonne" could not be trans-shipped, as there was no vessel avai large enough to carry it; and the plaintiffs relied on it for their transpo the Yukon River. Injunction granted, restraining defendants from causin permitting anything to be done in breach of the contract, and order made the "Garonne" be restrained from clearing for any port outside Br Columbia except St. Michaels.

E. V. Bodwell, for plaintiffs.

McColl, J.] CAMERON *v.* NELSON. [Ju

Rev. Stats. B.C., 1897, c. 1, s. 70, sub-s. 20, and c. 144, 89—Expiry of scribed time—Non-judicial day.

The Fire Limits by-law of the City of Nelson was published in the B Gazette, on 22nd July, 1897. Sec. 89 of c. 144, R.S. B.C., 1897, provides "No application to quash a by-law, order or resolution, in whole or in p shall be entertained unless the application is made within one month after promulgation of the by-law, or the passing of the order, or resolution, ex in the case of a by-law requiring the assent of the electors or ratepayers, w the by-law has not been submitted to or has not received the assent of electors. The last day of the month, August 22, fell on Sunday, and August 23, the plaintiff, who was an elector of the city of Nelson, wishin quash the by-law, applied to and obtained from the Supreme Court an o nisi, and on the return of the motion it was contended on behalf of the def ant that on the expiration of the one month the elector's statutory right wa an end. The plaintiff relied on R.S. B.C. 1897, c. 1, s. 10, sub-s. 20, which follows: "If the time limited by an Act for any proceeding or for the d of anything under its provisions expires or falls upon a holiday, the tim limited shall extend to, and such thing may be done on the day next follow which is not a holiday."

Held, that the application was in time, and that c. 1, s. 10, sub-s. 20 is confined to matters of procedure only.

Dechene v. *Montreal*, (1894), A.C. 640, considered.

E. V. Bodwell, for plaintiff. *A. S. Potts*, for defendant.

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INTERNATIONAL ASPECTS OF THE SPANISH-AMERICAN WAR.

By O. A. Howland, Barrister, Toronto, Ontario.

The conflict between the United States and Spain, now being waged to an effective conclusion, may be more important in its incidental than in its direct consequences.

Every great modern war between members of the family of nations is productive of effects in several directions. It may lead to territorial re-adjustments and dispositions, in which others in the society of nations may be disposed to claim a voice. It adds new developments to the science and rules of war. It contributes to the body of precedents which form international law. More lasting and often most important of all, it has reflex effects upon the internal constitution, character and future history of the nations concerned.

The causes of the disturbances in Cuba have been long impending; and the existing rebellion is less substantial, I might say, less respectable, than others which have occurred in Cuban history. It did not originate in towns or thickly settled districts. It had not the principal native Cubans in its ranks. It was not, like the great rebellion which ended in 1878, substantially a rising of the Cuban people of European descent. There is much probability that it was largely recruited from the negro labourers thrown out of work by depression on the sugar estates. Organized under the respectable name of rebels, they were not disappointed in their hope of obtaining support from foreign sympathizers.

Spanish corruption is probably the true cause of the intolerable prolongation of the process of suppressing this never really formidable insurrection. The implication of designed negligence, inspired by corrupt interest on the part of local authorities, in prolonging the war, is unfortunately only too consistent with Spanish

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Colonial traditions. The misconduct of the Spanish mil authorities ended at length in exciting a real and wide-spread i erance of Spanish domination throughout Cuba. Then suspicion and hostility on the part of the authorities, endin the horrible resort to ruthless deportation, or "concentration the inhabitants, and a general devastation of the country, in name of saving it from the banditti. What may be permis by laws of war in the case of hostile military operations, is defensible when exercised on such an immense and disast scale, towards the mass of a subject population, which it is duty of the Government to protect. It was an admission o competence in the work of defence; or it was a declaration of tility towards the whole people of the Island. In either case it an insufferable breach of the parental duty of a Government Government which can only maintain order by ruining destroying its people has abdicated its position and assumed of a mere foreign oppressor.

Nevertheless, this situation did not come under any of rules of international law as a justification for interference. I national law has a great respect for the rights of force. Fo however brutally exercised upon lawful subjects, is not interf with, provided these three conditions are present: (1) That acts are done by the legally constituted Government in the as tion of its authority. (2) That they are regular military or p measures for the suppression of insurrection. (3) That Government is powerful enough to make them effective. measures of the Spanish Government, even if construed as act hostility, directed against the whole Cuban people, were tec cally permissible, because the Government had the power to m them effective. The Government had in fact by these means a great extent, "pacified" the island. It had made a desola and called it peace.

While the grounds of interference in the affairs of an adjoi state were so strictly limited by international law as not to re the case of Cuba, the Anglo-Saxon common sense of the Un States people called for the application of the same device by wh an early English Parliament delivered English jurisprudence fr the narrow fetters of the common lawyers. If no precisely sim writ was to be found, let one be made to suit the case.

The American revolution was an economic protest more t a political revolt. Had the assertion of British Parliament

dominion not taken the form of tributes and monopolies, for the benefit of traders and ship-masters across the sea, the abstract principle, unconstitutional as it was, would not, at all events until a later date, have encountered such fierce and universal resistance. The evils wrought by economic wrongs extend beyond the borders of the state where they are inflicted. The depression of local industry and enterprise, through the discouragements imposed by arbitrary misgovernment, the consequent locking up of fertile lands from free development, the burdening of production with unreasonable tributes and exactions, all tend to make the products of the country scarcer and more costly to all the consuming world. To the consuming world, therefore, there is a general economic injury from local misgovernment. If it is not a wrong recognized in international jurisprudence, it is one felt by the people of all states, and of which the people are likely to take more notice in the future than their Governments have done in the past. In the vindication of economic rights against every form of oppression, the people will be more and more inclined to make common cause, bearing in mind that in fact they eventually bear one anothers' burdens.

It is possible that the retreat of the Spanish army of officials, following the Spanish military forces, which have till now protected it, might lead to the substitution of local officials equally venal and corrupt. Nevertheless, there is a substantial difference between the peculation of a succession of natives and tributary extortion through a succession of foreigners. The difference is not merely political but economic. When the plunderers are natives, the plunder, though circulating through foul channels, is not wholly lost to the country. The local accumulations are locally invested or re-distributed. But when the surplus wealth of a country is gathered by members of a favoured official class, who ultimately retire with their accumulations to their own country, miserable indeed is the state of the subject province. The springs of enterprise are sapped, the possibility of prosperity is withered in the bud. It is absentee landlordism on the hugest scale.

Struggling to keep within the lines of international precedent, the President of the United States was hindered from basing interference by the Government of the United States upon the grounds that really influenced the American people, and which were at least not less valid than the diplomatic pretexts. Absentee landlordism, resulting from private contract, may be modified, but can-

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not be abolished by national interference, unless by purchase. absentee landlordism, impressed upon a European colony, by of foreign arms, for the benefit of a distant foreign nation, i law but violence. When it is maintained upon this cont against the protest of the sufferers, it is a kind of oppressi an American nation, which falls within the spirit of the M doctrine, although the letter may be limited to nations which effectually declared their independence. A remedial move on the part of the United States, was already progressing i form of irresistible moral pressure. Concession after conce had been obtained. Successive advances were made towards autonomy and freedom for the Cuban people. The boun moral pressure might never have been passed, had not the des tion of the Maine occurred in the harbor of Havana.

Senor Du Bosc, in his recent lucid and able statement c Spanish case, at Toronto, enumerated with some triumph the cessions made by Spain as covering every demand of the C people, or of their sympathizers in the United States. In the breath he complained of the United States Government havin only recently, but for a quarter of a century past, permitted in ant encouragement to be given to Cuban insurrections. Is no connection between the two facts? Was not the grantir the approved constitution expedited, if not wholly procure the pressure of the recurring insurrections? If the United S in the last century would have been unable to successfully a the same principles without the help of France and Spain, the Cubans have hoped to effectually protest against their g ances without secret American assistance, backed by the imper sympathy of the United States as a nation? If we approve o end, can we altogether complain of the means which were per indispensable to the bringing of it about?

At length, however, the Spanish Parliament had concede the Cuban people an autonomic constitution, whose first Pa ment or Congress was opened, amid the echo of the bomb ment of Manila, and in the presence of the lowering circle of ships surrounding Havana. It is declared on behalf of Spain this constitution is modelled on that of Canada. If the claim correct, it would put the United States wholly in the wrong cause such a concession would have amounted to nothing than a grant of independence. It is worth while to examine justice of this representation.

A glance at the Canadian Confederation Act will reveal a wide interval that separates the two constitutions. The preamble of the British North American Act declares that the Provinces of Canada, Nova Scotia and New Brunswick "have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom." "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen. There shall be a Council to aid and advise in the government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be, from time to time, chosen and summoned by the Governor-General, and sworn in as Privy Councillors, and members thereof may be, from time to time, removed by the Governor-General. The provisions of this Act, referring to the Governor-General-in-Council, shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada. There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons. The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof, respectively, shall be such as are from time to time defined by Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers, shall not confer any privileges, immunities or powers exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof."

The golden line, which illuminates the whole of the statutory constitution, is the sentence in the preamble which incorporates the principles of the British Constitution. It causes us to read into the statutes the unwritten line which that constitution inscribes under the words Privy Council; namely, the essential understanding that the Queen's Privy Council, though in name chosen by the Queen, shall be a body really chosen by the people, the constituents of Parliament.

Our provincial constitutions, even before the Federal Union, had always implicitly, and in practice, been interpreted by this principle. Its incorporation has now been set down in express terms, solemnly recognized and registered by the British Parlia-

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ment. The Queen, as a constituent of our Parliament and head of our Executive, derives her title by her succession Queen of Great Britain. But in enacting and administering laws of Canada, she acts, not as Queen of England, but as Qu of Canada. It has been proposed to amend the royal title to c form to modern facts, and the amendment probably only aw a convenient moment. The oath to be taken by Canadian Pr Councillors has already, long ago, been so amended. A mem of the Canadian Executive Council simply swears that he will faithful and bear true allegiance to her Majesty, Queen Victo The Cubans, therefore, under a like constitution, would have b a free and independent people, having the Queen of Spain as head of their Government, but being in no wise subject to authority or Government of Spain.

The following abstract of the terms of the new Cuban C stitution, formulated in November, 1897, was communicated the London Times correspondent at Madrid:

1. The Cubans to enjoy all rights accorded by the Spar Constitution without limit of any kind.

2. Identity of political rights for Spaniards and Cubans w out distinction of race or colour.

3. The creation of a Cuban Chamber; all the members to appointed by a popular election; with a provision for a subsequ establishment of a Senate.

4. The Cuban Chamber to be empowered to vote on the e mates of expenditure, to make laws relating to public services, fix custom tariffs, and to decide on the responsibility of the me bers of the Executive power.

5. The Mother Country to assume the exclusive managem of international, military and naval matters, together with the co petent jurisdiction and organization of tribunals.

6. To also undertake the direction of political and civil la of a national character, and the control of expenditure under t head in Cuba and Puerto Rico.

7. The Executive power to be invested in the Govern General, with delegates whom he will have the right of appointi and who will be responsible to the Cuban Chamber.

The wording of the sixth clause, excluding "national legis tion" from the local jurisdiction, at once denies to Cuba t national status which is given to Canada. The clause making Executive Council appointees of the Governor-General, but resp

sible to the Cuban Parliament, lacks the benefit of the interpretative clause in the Canadian Act which imports the principles of the British Constitution. These principles are already negatived in the case of Cuba by the express exclusion of national powers under the sixth clause.

The reservation of "national" legislation to the Spanish Parliament by the sixth clause, obviously includes at least the whole field of criminal law, and probably much more. How much, would presumably be determined in the first instance by the Cuban Courts of Law; that is to say, by courts constituted and judges appointed by the Spanish Government, under the fifth clause. Their decrees will be executed in the presence of the Spanish army, the control and payment of which is also withheld from the Cuban Legislature.

With the one exception of custom tariffs, the status of Cuba corresponds rather to the limited powers of one of the provinces of the Dominion, than to the plenary national status of Federated Canada as a whole. The legislative, administrative, and fiscal authorities reserved to Spain are much what the arbitrary Emperors of Rome reserved to themselves, in their division of powers and revenues with the Roman Senate.

Senor Du Bosc somewhat triumphantly claimed that the Cuban status was more advanced than that of Canada, because the Cubans, in addition to their local constitution, were given thirty representatives in the Spanish Parliament. If there is one thing which well instructed Imperialists do not desire, it is the substitution of representation in the Home Parliament for their own national Parliaments. Such representation would be utterly inconsistent with the only logical scheme of a Federal Empire. For matters that require conference and co-operation, the Privy Councils of the different colonies, directly responsible to their own people and sitting amidst them, are their most effectual representatives. For purposes that concern them they really form, together with the Queen's Home Cabinet, the great Council of the Empire. Senor Du Bosc himself illustrated the illusory character of the Spanish system, when he stated that the thirty representatives of Cuba in the Cortes voted against the grant of Cuban autonomy. Such suspicious unanimity probably indicates by whom the delegates were really chosen, and of whom they were representatives.

The United States were justified in treating the autonomous constitution purported to be granted to Cuba as being, if not

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purely illusory, at all events far short of a grant even of real local independence. It certainly falls short of fulfilling the description of being a reproduction of the constitution and status of Canada. Still the new constitution contained the seeds of better things. It would have given the Cuban people (if they had proved worthy of their opportunities), an excellent standing-ground for working towards larger developments.

The bona fides of an autonomic constitution, however, can never be fairly tested in the presence of an overawing foreign army. The law of England enacted that garrisons should be withdrawn during an election. It was not illogical or unreasonable that the United States Congress should demand that Spain should make good her pretensions by withdrawing her army, so that the native Cubans might be able to put their new constitution to a free test. But it seemed to be also required, by the same logic, that the demand should be accompanied by a bona fide undertaking on the part of the United States to restrain their own people from interference, equally prejudicial to the experiment.

But at this moment, as if an extraneous demoniac hand had intervened, occurred the overwhelming disaster of the Maine. In the presence of a tragedy, men are not in the mood for business methods. The primitive passions of humanity were appealed to and thenceforth inevitably governed the action. The conviction of foul play was but disputably founded on the facts in evidence. But the prima facie bearing of the facts supported the conviction. At all events it took irresistible possession of the minds of the American people. Assuming that conviction, there would have been something ignoble in a nation accepting money damages as compensation for such a villainy perpetrated upon its defenceless sailors. It was a more chivalrous determination that nation should answer to nation; that the offender's flag should be torn from the spot where such a crime had been permitted under its protection, that the scene of the tragedy should be made a deodand to the Manes of the victims.

The mass of the American people cannot be blamed for following the unanimous judgment of their experts, even if the judgment was in fact not well founded; still less can they be censured for insisting on the only adequate and dignified remedy. They people obeyed their hearts and are blameless. But it is the duty of Governments to control the heart by the head; it is their proper office to make passion conform to justice. Crime calls for punish-

ment; but the hasty imputation of crime is equally a wrong. Spain, in the presence of an accusation, which would condemn her to everlasting dishonour, was entitled to a fair trial. Her plea for an international determination ought not to have been slighted. It ought even yet to be conceded, notwithstanding the war, and whatever may be its event. Upon the facts proved, expert opinion has arrived at its conclusions, by deductions, which are nothing more than conjecture. Expert opinion is not even unanimous in its conjectures. Experiment, under scientific direction, is the only final test; and experiment may not only relieve Spain of her supposed guilt, but may yet clear up the mystery in a manner beneficial to future constructors of warships and to the handling of the formidable modern explosives.

"If the Spanish Government," wrote the Madrid correspondent of the London Times, "as early as October last, had detected the firm resolve of the President to intervene, and was anxious to avoid war, why did it not accept the tender of good offices, made in such friendly terms ? The question occurred to me at the time, and I ventured to enquire whether a satisfactory solution might not be found, by accepting, with certain restrictions and reserves, the good offices tendered—whether at least it might not be worth while to ascertain what kind of a solution the President hinted at, when he described it as 'honourable alike to Spain and the Cuban people.' His Excellency kindly explained to me that, however reasonable my suggestion might appear to a foreigner imperfectly acquainted with the chivalrous character of the Spanish people, it was practically impossible to act upon it. He was a Spaniard and could not admit foreign intervention in internal affairs. Cuba was simply a Spanish province beyond the seas, and the Cubans were Spanish subjects, like the inhabitants of Aragon or Castile. If any Spanish Minister could be found weak enough to admit such intervention, he would raise throughout the country a storm of popular indignation, which would not confine itself to the overthrow of the cabinet which had permitted such national humiliation."

We are reminded of Dr. Oliver Wendell Holmes' famous classification of the six parties who are present in a dialogue apparently between two individuals. Behind John's images of himself, and of Peter, and Peter's images of himself and of John, there are the real John and the real Peter. Perhaps in this case the real Peter and John, standing behind the faces and voices of

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international diplomacy, were the irreconcilable and unchangeable determinations of the Spanish and American peoples.

To the President, Mr. McKinley, credit has been generally given, both in the United States and abroad, for having endeavoured to observe faithfully the high and terrible responsibilities of his office. I fully believe that he had every desire to avoid hostilities; or at least to wait an obviously just occasion on his country's behalf, and a favourable moment, after its preparations were complete.

It is, in the opinion of many, the misfortune of the United States Constitution that, while it exalts the Presidency into the supreme aim of ambitious chivalry, it does not endow the successful occupant with the necessary full powers to enable him to creditably discharge his responsibilities to the nation. Alike in respect to the internal policy to which he commits himself in his candidature, and in the conduct of foreign relations, he is at the mercy of hostile factions and prospective rivals in the two Houses, without whose concurrence he can do scarcely any important act.

The moderating disposition which many Presidents have exhibited in times of popular excitement, emphasizes a very great political fact; that concentration of responsibility, by the individualization of authority, is the best hope of good government under our representative systems. We have often seen the popular choice fall upon a mere party leader, not previously distinguished from his fellows, either by moderation of views or by any promise of statesmanlike insight. Yet the same man, promoted to a position where the decision of great issues is cast upon his single head, is seen to rise unexpectedly to the duties of the occasion. The mantle of kings seems to fall upon the individual who is called upon to exercise the office of kings. His vision is not always bounded by the November elections or the next Presidental campaign. His conscience takes the care of a nation in its keeping. That great ever-living Corporation becomes a guiding presence at his side; and he is able to hear the calm applause of history and the remote gratitude of future generations, above the roar of mobs, and the tumultuous passions and interests of the day.

The measure of individual power entrusted to the President is daily doing honour to the Fathers of the United States Constitution. That his powers were not made more explicit and com-

plete, unembarrassed by congressional interference, is daily coming to be recognized as a public misfortune. The dexterity of Presidents is repeatedly called upon to overcome the deficiencies of the constitution. By a master stroke of state-craft a former President, Mr. Cleveland, at an even more critical moment, obtained the necessary command of the situation. The Venezuela excitement was rapidly approaching a dangerous height. It was important to tide over the danger of the hour by means of a dilatory diplomatic commission. It was equally necessary, to make the expedient effective, that the President should acquire sole power of determining the personnel of the commission, free from the confirmatory control which the constitution vests in the Senate. To attain this end Mr. Cleveland paralyzed Congress by a message, so unexpected in its fierceness and boldness, that the Senate, in the surprise of the moment and under compulsion of popular enthusiasm, was obliged to surrender its control, and confer on the President the untrammelled power he demanded. He seized the opportunity to carry out his plan by selecting a commission of the learned, diplomatic and judicial quality he had intended, in place of one composed of furious politicians. The calculated deliberation of this commission carried the nation past the danger point, and delivered civilization from an imminent peril. In issuing his startling and apparently violent proclamation, the President was simply borrowing the device of the North American Indian, when threatened by a prairie fire. He set fire to leeward, and made a place of safety, in advance of the approaching conflagration. I hope that history will render belated justice to Mr. Cleveland, and that future generations of English-speaking nations will acknowledge their debt to his statecraft and courage. To his sole premeditated act it was owing that the war guns of the United States did not wake from their silence three years earlier, to spend their thunders in a more atrocious and unnatural war, against a thousand-fold more formidable foe.

Mr. McKinley appears to have sought to maintain the higher traditions of Presidential statemanship. It is evident that the President recognized, as a statesman, that, in a conflict with a European nation, other European nations might at some time or other claim a voice. He, therefore, with prudent foresight, desired to fortify the action of his country by keeping as closely as possible to European precedent. Such precedent was to be found in the action of the concert of Europe in the case of Crete. That action

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no doubt was of a very extraordinary kind. It would have puzzlec jurist to define or defend it, upon any hitherto known princip of international law. The great Powers intervened in Crete wit out invitation, either from the acknowledged sovereign—the Su tan of Turkey—or from any constituted insurgent governmer or even from any party among the inhabitants. Without declarir war, the Powers committed nearly all the overt acts of wa While acknowledging the Porte's sovereignty, they practically a nihilated it. They surrounded the coasts of his subjects' territo with their fleets; they forbade admission to his own fleets a armies. They landed their own troops upon his soil, and marcl them at their pleasure through the Island. They terposed their own military cordon as a protection to the insu gents. They established police, and, when necessary, fired up the subjects of the acknowledged sovereign. The Powers und took to prescribe to the Sultan the form of Government which should establish in his territory; and but for their own disagre ments they would have made the necessary appointments to it in motion. All these proceedings were covered by the mag term—Pacification.

The treatment of Crete was the model which Mr. McKinl proposed to follow in the case of Cuba. The circumstances Cuba were, at least by allegation, substantially parallel to thc which had existed in Crete. The United States, as an interveni power, was relatively in a position equivalent to that of the gre Powers operating in the Mediterranean. The only other gre power in America was the Empire, of which Canada is the tegral representative on this continent. Our Empire was taci consenting to action by the United States, without desiring to p ticipate in it. Mr. McKinley aimed at making his imitation of t action of the European Powers as close as possible. The purpc of intervention was to be not conquest but pacification. M McKinley was as scrupulous as the Powers in leaving the nomi foreign sovereignty untouched. No independent local Gover ment of Cuba was treated with or to be acknowledged; but lo liberty was understood to be pressed for, and the acknowledg sovereign was required to leave the inhabitants to work out t autonomy Spain herself instituted, free from the shadow of Spanish army. The work of police, if found necessary, was doubt to be undertaken by the forces of the United States. Li the Powers, Mr. McKinley desired to refrain from any declarati

of war, leaving that act to be taken by Spain, if she dissented from these arrangements.

While Mr. McKinley desired to put an end to every tangible grievance and to secure substantial liberty for the Cuban people, the aspiring leaders at the head of the rival factions in Congress had quite different aims. They put themselves at the head of the popular cry for the formal independence of Cuba. At the last the President appears to have suffered his hand to be forced. There is an unfortunate resemblance to the methods which brought about the miserable and fruitless war of 1812. Peremptory resolutions, inviting war, passed Congress, were confirmed by the President, and became the national ultimatum.

The President's policy was perhaps at fault in not more thoroughly taking the cue from President Cleveland's eminently successful method. He might have definitely pressed the Maine case as a conditional casus belli in his diplomatic communications with Spain. He would thereby have given expression to the real popular feeling animating the irresistible cry for war. By not doing so, the President played into the hands of the party whose object was war at all events. So distinct an issue was the last thing desired. Arbitration was sure to be tendered and the United States could not with decency repudiate the application of their own favourite principle, if it appeared that a substantial issue of fact as well as of international responsibility was in question. But it was clear to the war party that if the Maine incident was put forward, as the special issue, and met by a tender of arbitration, the United States Government would then be foreclosed from afterwards falling back upon any former grievance as a reasonable pretext of war. A definite prior grievance it would have been difficult to find. The large measure of autonomy already conceded to the Cubans promised that more would be obtained in time under continued pressure. The armistice which the United States required had been offered to the insurgents. The evil and suffering under the system of reconcentration were being alleviated. Congress carefully evaded making the destruction of the Maine its casus belli. The war has been commenced on other grounds and on these grounds must now proceed to its conclusion.

Mr. McKinley has been over-ruled as to the time of action, and, to some extent, as to the form of the justificatory declaration of the motive of the war. The position he desired to take was confused by the interference of Congress. Nevertheless the lines

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of the original Presidential policy are still discernible under t
Congressional palimpsest; and they may yet govern the future i
terpretation of the position. The struggle between the Preside
and Congress resulted in a compromise, which has made of t
Congressional ultimatum, conveyed by the President to Spain,
extraordinary a document as is to be found in Parliamentary
diplomatic records. Beginning with a recital of grievances, sor
of them no longer operative, and many of them based on disput
allegations, there follows, not a request for remedy, but a decla
ation of the incapacity of the responsible power, and a dema
that it should cease from attempting the remedy, and resign th
task to the United States. Waiving doubts as to the facts, the pr
ceedings so far, though undiplomatic in form, were hardly mo
so than the action of the Powers towards Turkey in the case
Crete. So far, the declaration departs little from the President
policy and the precedent he was seeking to imitate. The san
policy is further followed by a paragraph disclaiming in advan
the intention of conquest. For the purpose only of restoring ord
it is declared, the forces of the United States are to be employe
and when that object is accomplished they are to be withdraw
and the Government of the island left to its own people. Th
due place is given to the magic word—Pacification.

The chief battle between the President and the Houses w
over a clause which the Senate desired to insert, recognizing the i
surgent Government of Cuba, and declaring the Cuban people
be free and independent. This was the principal subject of t
final compromise. It resulted in eliding the words which reco
nized the independent Government, but left standing the remaind
of the clause, asserting that the people of Cuba "are and of rig
ought to be free and independent." The premises of the syllogis
remained after the conclusion had been struck out.

As applied to the existing conditions in Cuba, the stateme
that the people of Cuba are in fact free and independent, una
companied by recognition of any existing independent Gover
ment, is meaningless for any diplomatic or legal purpose. Und
international law, and of practical necessity, the recognition of
facto Governments is as necessary to the maintenance of th
society of nations as the theory of vested ownership of all visib
private possessions is to the national law property.

The clause as it stands is copied from a paragraph in th
declaration of independence of the United States. The famou

document is not much honoured by such an inappropriate plagiarism. The formula that the people "are and of right ought to be free and independent," contains two distinct statements. In both model and copy, an assertion of fact is coupled with an assertion of right. The virtue of the assertion of fact must depend upon its truth. Parliaments and Congresses are omnipotent within their own domain; but they have not the power to make that a fact which is contrary to fact; nor to impose a recognition of their assertions upon the outer world, at least in respect to matters happening beyond the national boundaries. The assertion of right has no validity whatever, because it is made by a stranger, not by those for whom the right is claimed.

The whole statement lacks the dignity and force which the same language had when it proceeded from the pen of the signers of the Declaration of Independence. The parties in that case were the regularly constituted de facto representatives of the Colonies to whom their declaration related. They were sufficiently de jure representatives to be authorized to fling down that gage on behalf of their constituents. Their constituents, the people of the United Colonies, had the right to join in such a declaration, because they were prepared to ratify it by their own actually organized and efficient force. Their success ripened a de jure claim into a lawful fact.

On the termination of the war, the United States Government will be called upon to face a number of perplexing questions, in respect to which the terms of this declaration may involve important consequences.

Although coupled with this clause was another which called on Spain to withdraw her Government and authority from the Island of Cuba, yet the wording of the whole ultimatum, as finally settled, is susceptible of an interpretation which may leave the victory with the President. The nation may not find itself concluded from carrying out the President's policy in the final arrangements respecting the status of Cuba. This suggestion will be discussed in the part of this paper dealing with the probable result of the war.

The nation was hurried into war, greatly to its disadvantage from a military point of view, and scarcely less to its disadvantage in a moral sense. Foreign observers are left to doubt whether war with Spain was necessary. If it was unnecessary, unless war be regarded as an end in itself, it was a premature and prejudicial

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avenue to the desired results. In the meantime onlookers are i
better position to judge this subject conclusively than the pe
whom it principally concerns.

Peace and civilization are the boasted ensigns of the Eng
speaking family of nations. If war we must, let not only the c
be just, but the manner of warfare honourable. The exampl
amelioration in the laws and practice of war may compensat
some extent for the breach which war makes in the edifice of c
zation.

The war, only formally announced by a resolution of
United States Congress, after the United States fleet had n
a number of captures of unsuspecting merchantmen, rather
nearly approached the Irish rule of commencing hostilities
"A word and a blow—the blow first." Writers on internati
law have sought to prescribe much more deliberate formalitie
necessary to the making of a lawful war. Learned disquisit
on the denunciatio belli to the enemy and the declaratio bel
the neutral nations were founded on the dignified if somev
cumbrous procedure of the ancient Roman Republic and its
cessor the Roman Empire. Much of this theory has little to
with modern practice. Dignity and courtesy and disdain of n
surprise are desirable rules to maintain even in war. But w
nations do not choose to observe such rules, nice customs perf
"courtesy to great kings."

An enlightened patriotism must surely blush at the shou
exultation and acclamation sent up by the press of a great Cl
tian nation over each of those pitiful captures. Sentiment
humanity revolt against the sordid calculation of gains, wl
mean the ruin of a few enterprising merchants—protestants,
haps, against the war—the interruption of honest industry,
the beggary of unemployed seamen.

Americans could hardly have read with pride of the surp
by American cruisers and battleships, of innocent merchant
under the Spanish flag, actually in advance of a formal declara
of war, and certainly without the favourable period of warn
which modern civilized practice sanctions. Fortunately for Am
can credit, these premature seizures seem to have been practic
disavowed by the terms of the President's proclamation. But
whole scope of the proclamation is an authority to United St
Naval Commanders to prey upon Spanish merchant ships and t

contents. In other words it is an instruction to continue the capture of private property at sea, in a war which may close the record of the nineteenth century.

No two nations in the world are likely in the future to have so vast an interest in establishing the immunity of private commerce as the British Empire and the United States. When the channels between the Great Lakes and the sea are deepened, as they infallibly must be, the United States will possess the best facilities in the world for the building of steel shipping. Before many decades pass a vast share of the trade of the Clyde and the Tyne may have been shifted to the shores of Lake Erie. A ship-building nation will soon be a ship-owning nation. In some future war the United States may bitterly regret that they did not in good time lay an effectual foundation, by their own example, for protesting against the lawfulness of national piracy.

The United States, whose fleet was in such haste to begin the work of maritime spoilation, formerly signalized themselves by proposing the neutralization of private property at sea. In 1856 they stood alone as the advocates of the total abolition of the right of capture.

International law grows by the practice of nations more surely than by paper rules and formal conventions. The present war was, and may yet be, an opportunity for the United States to make, by its own conduct, a first precedent in striking the right of capture from the list of the permitted iniquities of warfare.

The standard of what is honourable and lawful in the defence or enforcement of national rights by war has fortunately long been an advancing one. Nations have left to foreign tribes many methods which were permissible to the great nations of antiquity. We seek on the field to win battles rather than to destroy men. We have long ceased to sell vanquished nations into slavery, or to put the entire population of captured cities to the sword. We have gone, by common consent, much farther than this. It would no doubt surprise Wallenstein to learn that we no longer permit the sacking of an enemy's town. As far as possible private property is unharmed by an invading army. Subsisting an army upon the plunder of farmers and townsmen is no longer avowed as an ordinary maxim of warfare.

It is only at sea that the ancient principle that war is principally an opportunity for legalized plunder still obtains. It is a maxim which the civilization of our country has already shaken

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upon its throne. The principles of the Paris Convention in 1856 were a great advance on the universal practice of the past. The United States, Spain and the Spanish Republics declined at that time to accept those terms. It is so far satisfactory that both Spain and the United States, though not among the signatories to that convention, have now definitely adhered to most of the rules. Neutral ships protect enemy's goods, and neutral goods do not share the fate of the enemy's ships in which they are found. Both combatants have so far regarded the Declaration of the Paris Convention against privateering. Their hesitation is a deference to the conscience of the nations, and the augury is favourable for confirmation, through their action, of the righteous prohibition of one of the most indefensible wrongs and brutalities of war. It is understood that influence to this end was used by the British Government both upon the United States and Spain. We may be proud that the first fruit of the rapprochement of English-speaking opinion has been to lead two governments to stay their hand from perpetuating the barbarous expedient of legitimatized piracy.

It is not surprising that the United States Government should hesitate to introduce this retrograde practice into the present war. It is the glory of the English-speaking race, since the days of John Howard, that it has led the way by national and voluntary effort in the work of redeeming and diminishing the criminal classes. It would ill become the land of prison reform to authorize the education of a race of corsairs. Even in the bitterness of the war of 1812 the issue of letters of marque was authorized against the protest of a numerous minority of right-feeling people in the nation. President McKinley has not desired to leave record against his country a more barbarous disposition, at the close of the nineteenth century, than prevailed in its first quarter.

Though a distinct gain has been made towards the humanization of war, it ought not, for the honour of our race, to be the only one. So far, the United States have merely brought the action up to the standard set by the great European Powers in 1856. Nearly thirty years have elapsed since two great nations have been at war. Has a whole generation of civilization no advance to record in the regulation of hostilities? The tendency of international law aims at limiting the scope both in time and place of the destructive effects of a state of hostilities. On the field we seek to disable men, not to kill them. We occupy territories but do not devastate them. Modern warfare tends to respect

the property as well as the lives of non-combatants on land, and the logic surely applies with not less force to private property afloat.

Not only humanity but economics claim a voice in the matter. A war of destruction is a war against mankind; because a loss of real wealth is a loss to all the world. The wealth fund and the labour market of the world are really universal. When commerce is destroyed and enterprise plunged into ruin, sooner or later the wave of sinking will reach the farthest shores. The damage from public as from private plunder is out of proportion to the profits. There is loss in the disposition both of stolen and of captured goods. The thief is obliged to realize his booty at a great discount. The cargoes of captured ships are diverted from markets where they are in demand, to be sacrificed at ports where they are not wanted. In the complexities of modern commerce the loss by no means necessarily falls upon the enemy. The insurers may be citizens of a friendly nation; they may even be subjects of the capturing power. War risks make high freight rates; and the added cost must be taken out of the living of the people.

What gains may be reaped will be reaped by a few; whatever loss is in fact occasioned must infallibly fall upon the many. Well might the people of these nations uplift their allied voices in protest against the continuation in this war of the most wasteful of its practices. It is only the continued silent acquiescence of civilized nations that veils the hideousness of the law of capture, and protects it from irresistible condemnation.

The real root of the practice is to be found in the fact that wars were originally simply plundering expeditions. When the advance of civilization, and the settlement of tribes into nations, led to the foundation of a science of international law, the early writers were compelled to invent an artificial basis for this survival of the simple usages of barbarism. This is how they endeavoured to accomplish it:

"When the sovereign or ruler of the state," wrote Vattel, Bk. III., Ch. 5., "declares war against another sovereign, it is understood that the whole nation declares war against another nation; for the sovereign represents the nation, and acts in the name of the whole society, and it is only in a body, and in her national character, that one nation has to do with another. Hence these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other. When once we have precisely

determined who our enemies are," he continues, "it is easy to kn
what are the things belonging to the enemy (res hostiles). V
have shown that not only the sovereign with whom we are at w
is an enemy, but also his whole nation, even the very women a
children. Everything, therefore, which belongs to that nation
to the state, to the sovereign, to the subjects, of whatever age
sex—everything of that kind, I say, falls under the description
things belonging to the enemy."

How does this amiable doctrine stand in the light of la
civilization ? Are we now prepared to admit that because o
respective Governments are at war it becomes our duty as citize
to set our hand against every man in the opposite nation ? A
we to consider not only every man but every woman and child
our personal enemy ?

The argument for privateering adduced by the Governme
of the United States, in 1812, in answer to the protest of many
their people, was very frankly founded on this doctrine. It w
pleaded that as the purpose of war is to damage and injure t
enemy until he submits to the wishes of the belligerent natic
therefore it was as lawful and righteous to damage him by spo
ation of the private property of his subjects, as by demolishing h
forts and attacking his armies. The argument was used to justi
privateering. If disaffirmed, it makes the same ravages indefe
sible, whether inflicted by privateersmen or by men-of-war. T
argument answered then. That it will not answer as well now
proved by the condemnation of privateering, agreed to by a majo
ity of European nations in 1856, and now confirmed, by t
adhesion to that principle of two of the group of nations whi
formerly dissented from the Paris declaration.

The true trend of modern thought was thus stated by Profe
sor Robertson, as early as 1881 : "That the non-combata
portions of the two communities should remain as though th
were in a state of peace, is the principle towards which inte
national law appears to be tending. The movement against priv
teering is an illustration of this tendency. In war carried on
land, non-combatants are as far as possible kept out of the sphe
of operations—only persons under public military command bei
regarded as combatants. In naval warfare it has long been reco
nized as a valid mode of conducting hostilities to grant "letters
marque" to private vessels, owned, manned and officered by pr
vate gangs of free-booters. The Treaty of Paris of 1856 contai

the famous declaration 'that privateering is and remains abolished,' and the adhesion of the United States to this principle would go far to make the practice illegal by the law of nations. Hitherto they have declined, 'preferring the more comprehensive policy of prohibiting the seizure of private property of all kinds by ships of war. This point conceded, the United States would assent to the abolition of privateering.' "

It is strange that, now that the opportunity is all their own, the United States no longer show a disposition to abolish capture by ships of war. Waiving their former condition they have simply fallen in with the prohibition of privateering. The presumable objection to commissioning privateers is that the privateer frankly goes into the business on account of its profits. The distinction is shadowy. Both privateers and ships of war plunder under commission; both are controlled in their plundering by authoritative limitations and regulations, both of international and municipal law. The distinction between the two methods all but vanishes in the presence of the custom of dividing the value of prizes, taken by warships, among the officers and crew, under the name of prize money. The profits from seizures are actually being held out at the present moment, in the United States Press, as an inducement to enlistment in the navy. Calculations are publicly made of the fortunes already reaped by the Commanders. Is not the practice calculated to degrade the regular naval service to the standards of privateering ? How far are the new men enlisted in such a spirit really better than privateersmen ?

The invention of "Volunteer Fleets" by the very signatories of the Treaty of Paris, establishes that as long as capture is permitted privateering will not really be abolished.

Thus writes a Rear-Admiral of the French Navy in the Gaulois : "We shall patiently bide our time, and it will certainly come. Meanwhile we shall organize an implacable system of privateering against the trade of our eventual enemy. I know not what diplomatists may think of the Convention of 1856, but as for us sailors, let the English be assured beforehand that we shall carry on privateering against them, and let them take the ruin of their maritime trade into their forecasts."*

To such a point has the leaven of capture corrupted the service of a European nation. This naval officer of high rank betrays the spirit of the privateersman. He openly repudiates the honour

* Rear-Admiral Dupont, London Times, May 19th, 1898.

of his country and his duty to submit to its engagements. T
nation which claims to lead European civilization, and which i
vites the world to celebrate the close of the nineteenth century
its capital, declares by this spokesman that it is ready to repeat t
equivalent at sea of that atrocity of the Middle Ages, the deva
tation of the Palatinate. Will it allege as its justification the rep
diation by the United States, in their own case, of their form
humanitarian stand on the morality of capture?

From some acquaintance with its personnel and its metho
I entertain a profound respect for the American Naval Service.
achievements in the war of 1812, on lake and sea, let us be pro
to own, showed that our kindred are also no unworthy descendar
of the Sea Kings. While it was debarred by peace from feats
arms, it was winning better victories in the field of science. D
Kane led a creditable expedition in the track of Sir John Fran
lin, and in that icy prison supported the hearts of his crew throu
the gloom of two Arctic winters. Commander Wilkes reveal
the outlines of the Antarctic Continent. Lieutenant Maury la
down the course and boundaries of that mighty river in the ocea
the Gulf Stream. Captain Mahan's monumental work, on the S
power in History, is one of the great efforts of professional a
historical learning. In the work of the United States Fish Co
mission, in the survey of the lakes, in the lighthouse service, a
far from least, in the wonderful system of the Hydrographic offi
those able officers have rendered most distinguished aid
Science, Commerce and Humanity.

Once more set upon its mission of war, in the action
Manila and subsequently, the service has well maintained
record. Although the superiority in ships and guns made t
result of any encounter almost a certainty, still boldness a
strategy were necessary to obtain positions to make these adva
tages tell; and these qualities have been displayed in a high degr
The more does one sympathize with the mortification of the Co
manders of that honourable service under the ridiculous press glo
fication of wretched exploits in the chase of helpless merchantm
It is not a business to which brave men ought to be ordered.
noble professional standard ought not to be lowered by setting t
navy upon the hunt for prize money. Gallant officers and cre
ought not to be reduced to the position of bargaining lawyers, w
are expected to make their costs out of the opposite party.

Even if the barbarous notion of the objects and means of w

upon which the Government of 1812 took its stand, is to be considered maintainable to-day, regard must be had to the reason and limitations of the rule. Thus Vattel lays down what a nation engaged in a just war is allowed to do to her enemy: Book III., Chap. 8, "The whole is to be reduced from one single principle from the object of a just war; for when the end is lawful, he who has a right to pursue that end, has, of course, the right to employ all means which are necessary for its attainment. The lawfulness of the end does not give us a real right to anything further than barely the means necessary for the attainment of that end. Whatever we do beyond that, is reprobated by the law of nature, is faulty and condemnable at the tribunal of conscience. Hence it is that the right to such or such acts of hostilities varies according to circumstances. What is just and perfectly innocent in war in one particular situation, is not always so on other occasions. Right goes hand in hand with necessity and the exigency of the case, but never exceeds them. The sovereign who would preserve a pure conscience, and punctually discharge the duties of humanity, ought never to lose sight of what we already have more than once observed, that nature gives him no right to make war on his fellow men, except in cases of necessity and as a remedy ever disagreeable, though often necessary, against obstinate injustice or violence. If his mind is duly impressed with this great truth, he will never extend the application of the remedy beyond its due limits and will be very careful not to render it more harsh in its operations, and more fatal to mankind, than is requisite for his own security and the defence of his rights."

Unhappily Vattel's doctrine is an appeal to conscience rather than a statement of law. But if the reasoning commends itself it remains for precedent to make it law.

In a desperate struggle for existence a nation on the defensive could not be restrained from using every means and striking out in every direction. But when a war is waged merely in the assertion of some definite principle or for the attainment of some limited object, without imperilling the substantial integrity of either nation, then every means which might be expedient cannot be considered lawful. The cause and object of the war by the United States upon Spain is limited to obtaining the concession by Spain of liberty and independent self-government to a particular portion of her subjects. The right of intervention is claimed on humanitarian grounds, and is resisted on the point of honour of

sovereign right. Never could there be a clearer case for tre war as a duel, to be fought with regular weapons, by the appo military and naval champions of the respective contestants. N could there be less justification for resorting to the savage ciple asserted in 1812, that war is a work of hate and destruc in which the methods of hatred and the agencies of destru may be used without limit, upon every subject, however inno to which they could be made to reach. Never was there b opportunity for setting an example assigning one more rest upon the wickedness and destructiveness of international wa The captures have been comparatively small in number and v It would be easy for the United States to make offer of comp tion to the despoiled owners. At least the value ought t deducted from the ultimate demand of a war indemnity.

I do not lose sight of the relation of this question to Cana commercial interests. There has been a prospect of tempo gain to the trade of Canadian ports and Canadian carriers, thr the peril to which the United States sea-going commerce is posed, by liability to capture and destruction. This is a ca which the direction of our wishes will test the strength to w our morality has withstood the strain of the modern comme spirit. I should hope for the honour, I will not say of Canada of humanity, that no consideration of temporary gain will pre our uplifting our voices, in unison with the best thinking pe of the neighbouring Republic, in appeal to the United State take the course which will do honour to itself, to our great lish race, to the civilization of which we boast, and to the hur and christianized principles to which we profess to adhere.

If the United States acquire military possession of Pu Rico it will be a conquest and will be dealt with by the conqu as may seem to them most in their interest. Their dispositio it is not a matter in which foreign opinion is likely to be in or would have any weight. The possession of Puerto Rico make one European Power the less to divide with the U States the naval oversight over the approaches to the f Isthmian Canal. Whether the canal shall be situated at Pa or Nicaragua will matter little. Its control will depend less commercial ownership or territorial title than upon practical ascendancy in the Caribbean Sea. There can be little doubt will be the fate of Puerto Rico if the flag of the United States waves over it. There will be plenty of opportunities in a se

ment for the display of national generosity without going the length of national quixotry, such as Great Britain so often exhibited at the conclusion of her successful wars in former centuries.

The Philippines seem to be the subject of some illusions. They cannot yet be described as a conquest. It is possible that no event of the war with Spain will achieve that result. There is nothing which the United States can conquer from Spain, or which Spain has it in her power to cede, except the possession practically of a few factories on the outskirts of a populous native territory, much of it resembling in its political conditions the Congo State more nearly than a European colony. The interior has been a mission field rather than a possession. It is probable that the Spanish Government has not maintained the religious orders so much as the missions have secured submission to the Government. The semi-christianized Malays and other tribes have now revolted and overthrown the dominion of Church and State alike. It will be those tribes rather than the Spanish Government with whom terms will have to be made to settle the future status of the Philippines. The suzerainty of millions of semi-independent Asiatics may on close contemplation not prove to be an inviting responsibility for the United States Government to assume.

The question will arise, what is to be done with Cuba; and the action taken by the United States will materially reflect upon her objects in instituting the war, and will influence the respect in which perhaps the whole family of English nations shall henceforth be held among the foreign countries of Europe.

The United States have undertaken the war upon a specific undertaking to pacify and then retire from the Island, as expressed in the published declaration, in the following terms: "Fourth: That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the Government and control of the Island to its people."

A disposition has been exhibited in a portion of the United States Press to assume that the disavowal of annexation is no longer binding, because the Spanish Government assumed the initiative of hostile action and dismissed the United States Minister in anticipation of the delivery of the ultimatum. Stronger ground might be taken. An ultimatum is a tender of conditions of peace. If the tender is not accepted, the offered conditions may be pre-

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sumed to be withdrawn. But if this technically discharges obligation to Spain it may still remain with regard to fore nations. The old writers on international law made much of necessity of the causes and objects of war being declared not o to the adversary but to neutral nations.

Thus Vattel: "A sovereign is to make the declaration of public within his dominions, for the information and direction of subjects. He is also to make known his declaration of war to neutral powers, in order to acquaint them with the justificat reasons which authorize it—the cause which obliges him to t up arms—and to notify them that such or such a nation is enemy, that they may conduct themselves accordingly. This p lication of the war may be called declaration, and that which notified directly to the enemy, denunciation; and indeed the La term is denunciatio belli."

Although a publication or declaration to the neutral nati of the causes of the war may not be technically so indispensable Vattel sought to establish, yet the terms of a justification, actu made, have a certain obligatory force, for a reason implied, not mentioned, in Vattel's reasoning. It is in view of everyth contained in such a declaration that other powers determ whether they will remain neutral, or whether they will unite interfere, or severally ally themselves with one or other of original parties to the war. The nations which have so held the selves neutral will expect the terms and conditions, announced the cause and purpose of the war, to be adhered to after its c clusion.

Europe has never ceased to keep Great Britain in mind the undertaking upon which, in the presence of Europe, she tered into possession of Egypt; namely, that she would remain long as the condition of the country made it necessary. It was elastically expressed condition, and is not likely to be fulfilled long as the inhabitants of Egypt are principally Fellaheen, and ruling classes Mahommedans; nor as long as the departure Great Britain would cast the reversion of supremacy upon the c rupt and oppressive powers at Constantinople. Europe is likely to insist on a recession of Christendom before Maho medanism.

In the case of the United States the disclaimer of annexat and the undertaking to retire when pacification is accomplish are clear and definite. Exact fulfilment may be insisted upon v

all the influence of the Council of nations, in whose presence the pledge was made. No doubt the United States may find plentiful examples of perfidiousness in European history. The question for herself is whether it will be to her advantage in the long run to imitate them. As a newcomer in the great world of international politics, she has her character to make.

A curious rumour was reported by the Times' correspondent at Madrid: "Once or twice General Woodford used in the presence of the Spaniards who were not officially connected with the negotiations, but who were in intimate private relations with influential personages, certain vague expressions which were rightly or wrongly interpreted to mean that an amicable arrangement, satisfactory to all parties, might be found in some financial operation. At a very early stage of the negotiations important information emanating from a trustworthy source in Washington reached the Spanish Government, and even found its way in a diluted form into the Spanish newspapers. It was to the effect that a very wealthy syndicate had been formed for developing the enormous natural resources of Cuba, that it was ready to take over the Cuban debt on condition of being entrusted with the financial administration and protected by a guarantee of the United States Government, and that the scheme had found favour in the eyes of President McKinley. With regard to the question of sovereignty the syndicate was quite indifferent, and was ready to acknowledge Spain as its nominal overlord, and even pay to the Spanish Treasury a small royalty on its mining operations, provided always that it was in no way hampered by the Spanish Government or by Spanish officials. It is not surprising that Mr. McKinley should have regarded the project with favour, because it semed to furnish a means of bringing Spanish domination in Cuba to an end without the necessity of going to war and without using even such a disagreeable term as 'the sale of the island.' More than this, it helped the United States Government out of a serious difficulty. It is no secret that Mr. McKinley, like very many of his countrymen, regards the absorption of Cuba into the United States as the inevitable ultimate solution of the Cuban question, but he perceives clearly the practical inconveniences and the serious dangers of immediate annexation. For this reason he would like an intermediate transitional stage during which the people could be educated up to the level required for absorption."

Whether or not such a syndicate proposition was secretly en-

tertained by the President before the war, and whether or not such a syndicate still stands ready to carry out the scheme, it is inevitable, in case the United States Government controls Cuba, that an abundance of schemers will seek to make the United States Government, or its representatives, the engine to obtain concessions and other advantages for themselves, at the expense of the inhabitants. It was virtually for the suppression of the forced exploitation of the Cubans by foreigners that the American people undertook the expulsion of Spain. Will they consent to replace Spanish exploitation by exploitation through an American syndicate, under the protection of a United States army of occupation?

Unhappily the state of Cuba will, very likely, too truly resemble that of Crete. The war has been more or less a civil war between the two parties, the Spaniard born settlers and the native Cubans of various origins. Divided as these two parties will have been by bitter conflict in arms, reconciliation and fair and honourable co-operation will be a distant probability.

Is the United States to take sides in this division of parties by expelling the Spanish element or by keeping them under subjection to the other party by arms? I cannot believe that the people of the United States will desire to re-enact in Cuba the scandal of the carpet bag Governments of the Southern States. If the United States Government, on the expulsion of the Spanish troops, retires at once from Cuba, it leaves, in all probability, a state of affairs more hopelessly disastrous than that which it entered to terminate. The promise of pacification would be unfulfilled. A course which most obviously corresponds with the constitutional situation created by the resolution declaring war, also corresponds best with the European precedents in Crete and Egypt.

The resolution of Congress excludes Cuba from Congressional jurisdiction, by the declaration that the control shall be only a control and possession for pacification, that is, necessarily by the military forces. Under the Constitution of the United States the command of the army outside of the boundaries of the United States is vested in the President. Through the army, acting under the directions of the President, Cuba may be occupied and controlled until the time comes when a real pacification is accomplished, and the island is fit to be left to the government and control of its people.

The precedents of United States military administration of the Indian and other departments give every reason to expect that

in their hands, responsible only to the President, the trusteeship of Cuba would be honourably discharged. If military Commanders would be fitted for the whole duties of civil administration, the United States possesses men not unlike the stamp of civil administrators who have made so honourable a record for Great Britain in India and Egypt. Their services have been lent to China, Egypt, and Japan, where they have displayed not only abundant ability but that rarer and higher quality, the spirit of trusteeship. Under such auspices, provided successive Presidents were permitted to employ them, American, British and other European settlers might be attracted to share in the development of the island. In time these would become a moderating and probably controlling third element of the population, and a basis would then exist for peaceable and businesslike self-government. Following the precedent which it was necessary for Great Britain to make in Egypt, a firm and honest military Government must not only be established, but assurance given that its administration will continue to secure peace and protection; and that enterprising settlers will not be prematurely abandoned to anarchy or a ruinous regime of adventures.

The United States administrators cannot honourably either directly, or through any pretence of local autonomy, make the control of revenues and taxation a means of excluding the trade of foreign nations. A military Government would have the right to charge the revenues with the expenses of the occupation and to levy the necessary imposts. But inasmuch as the declaration of Congress has disclaimed sovereignty, jurisdiction or control, except for pacification, the British methods in Egypt will be obligatory in honour in respect to the methods of raising revenue. To give a preference in trade to the United States would be a violation of the trusteeship, and a breach of the principle of the undertaking given in the face of Europe.

United States occupation would involve another embarrassment arising out of the peculiar status under the initiatory declaration. Recognizing no insurgent government or status of independence, the United States, by necessary implication, acknowledged the continuance down to that date of the actual lawful government over Cuba. The acts done by that lawful government, the laws declared and contracts created in respect of Cuba are valid and binding at this moment. Cuba now stands charged with a large public debt, lawfully, even if oppressively, made payable out of its

revenues by its hitherto existing Government. Inasmuch as the island is not to be a conquest of the United States, the United States will have no right or power on their own behalf to alter the status of the island in respect to these obligations. The island cannot become freed from them merely by virtue of any later assertion of independence by its own inhabitants. By the law and practice of nations, which Continental Europe may call upon the United States to respect, independence will not legally exist until there has been a treaty of peace between the original sovereign and the separated territory. The United States plenipotentiaries in 1783 recognized the necessity of such an acknowledgment from the King of Great Britain, and most anxiously exacted it, before proceeding to negotiate any other article of that most important treaty of peace. The United States may be in possession of Cuba by her troops but she cannot compel Spain to conclude peace and recognize the independence of the island. Terms of peace will, therefore, require to be arranged, and European nations may support Spain in withholding her consent, unless an equitable charge is agreed to upon the revenues of Cuba in respect of its existing debt, of which Spain is in a position of guarantor to the holders of the bonds.

Spain's claim in this respect will be immensely fortified if she abstains from the right of waging destructive war upon the United States commerce. The forbearance will give her a moral claim which the people of the United States themselves will feel obliged to recognize. The Spanish Government would, of course, be in a still better position if it were to treat for peace while still in possession of Cuba.

There is another and more magnanimous course, by which at the same time, the United States might relieve itself from many difficulties, and abandon Cuba to its own inhabitants, without responsibility for the use they may make of their freedom. The President's original position might be reverted to, by an interpretation of the ultimatum that would involve no stultification of the declaration by the United States Congress, that the people of Cuba are and of right ought to be free and independent.

This assertion, and the demand made in the ultimatum of the United States Congress, that Spain should withdraw her government and authority, would as a constitutional fact be satisfied by the continuance of Cuba under the nominal sovereignty of the Spanish Crown, according to a facsimile of the Constitution of

Canada. The bona fide concession to Cuba of a status parallel to that which Canada now enjoys would be followed by the withdrawal of the Spanish army and the neutralization of the island. It has been shown in the early part of this paper that the Confederation Act makes the Canadians practically free and independent. Are Canadians subject to the authority and government of any other nation? The same constitutional document implicitly negatives it.

Canadians are not less "independent" because a common Crown joins them in perpetual amity with other peoples, of whose Parliaments our Queen is also the head, the whole together constituting a vast and free Empire. Alliance is not dependence, nor does union imply subjection. Citizens of an American state are also part of a larger union under a President who governs. Are the citizens of the several states of the Union not free and independent? It will be difficult to convince Canadians that American citizens are free and independent in any sense in which citizens of the Dominion of Canada are not also free and independent. The form of monarchy is nothing. Canadians are not less free because the head of our Executive and Legislature dates her title back to an election in 1688, instead of to a date four years or less ago; nor because the succession is provided for otherwise than by a quadrennial revolution, not without its passions, its perils, and sometimes its corruptions.

The Cuban people may also be free and independent under a true national autonomic constitution, such as governs the relations of Canada to the Empire, with which as a whole she is united, but to no part of which she is subject. Under such a constitution Spain would not possess or rule Cuba, though the Queen of Spain would continue to be Queen of Cuba.

The declaration of the United States Congress in respect to the Cubans does not therefore literally involve any greater consequences than this: that the United States insists that the autonomic constitution granted to the island shall be so amended, and the letter so interpreted and applied, as to reproduce the spirit and practice which the British Constitution imports into the similar statutory Constitution of Canada. The withdrawal of the Spanish army is a reasonable condition, inasmuch as its presence would reduce the concession to a mere pretence. Neutralization of the island for military purposes might follow. Would not the adoption of this interpretation of its own declaration, by the United

States Government, throw upon the Government of Spain the guilt of a premature and unnecessary declaration of war? May it not open the door to a settlement which will relieve both nations of many difficulties? Last, but surely not least, may it not accord best with the wishes of the majority of the inhabitants of Cuba?

If the Queen of Spain is left to be nominal sovereign of the neutralized island, even Spanish pride need suffer no real blow, and Spain would be a gainer by her seeming loss.

This result ought not to be distasteful to the feelings of the conquerors. They have nothing to gain by adding internal disaster to military defeat. The ill-cemented constitutional structure of Spanish Government, built on modern and liberal ideals, would hardly survive an exasperating national humiliation. Moderation on the part of the United States, refraining from breaking the bruised reed, might earn the ultimate gratitude, in place of the perpetual hatred, of this historic, if long misguided and unfortunate people.

The glory and mission of the English nations (of which no small share belongs to the United States), is in the success of the great principle of government by the people. Through that channel has flowed the enlarging flood of economic improvement and economic justice, to which the world already owes so much and from which it has more to hope. Political pride and economic wisdom alike rejoice at the triumph of these ideas in every nation. Nothing would so much retard the advance, which Spain has been attempting in this direction, as a disastrous humiliation, plunging the nation back into the utter ruin of revolution and anarchy.

The first great need of Spain is solid national unity around a settled constitutional Government. For more than a century the unhappy country has been a prey to divisions and disorders, ruinous to its prosperity, demoralizing to Government and people. Torn by successive revolts and revolutions, it has been by turns a kingdom, a republic and an anarchy. The throne has continued to be the prize of rival pretenders, long after all other European countries had settled this first principle of the national establishment. While the central sun is subject to continual mutations, disorder must be the law of the system.

To too many Spanish minds kingship appears to be still mantled with ideas brought from the Middle Ages. They attribute to it disproportionate sacredness and importance. The throne is still treated as an inheritance of right and the coveted seat of

power. The schemes of the Carlists recall us to the Wars of the Roses. It seems to be hard for the Latin nations, notwithstanding that all are endeavouring to imitate the British Constitution, to grasp the conception of the Crown as simply a high office of trust, existing, in common with every other office of the State, at the will as well as for the benefit of the people, and subject to a trustee's responsibility to them. With their mental and legal training the Latin nations may be pardoned if they are slow to appreciate that unwritten but fundamental principle of the British Constitution. English lawyers of the old school long found it impossible to grasp the principles of equity which reversed much of the common law. British constitutional practice likewise has converted the simple lines of the Constitution to meanings precisely opposite to the forms. Even our own Sir Wilfred Laurier, a recent but loyal convert to Imperial union, has betrayed by his language on several occasions his incomplete grasp of the same principles, which, on a larger scale, are the key to our Imperial constitutional system.

If there is left in royal pretenders or advocates of republicanism any vestige of the pure and ancient blood of Spanish patriotism, they will recognize that now is the time to drop, not only once but forever, the dagger of revolution, constantly aimed for selfish purposes at the throat of their country. At one moment, in the presence of her misfortunes and her necessity, Don Carlos on the one side, and the Republican leaders on the other, announced their honourable decision to refrain from widening the wounds of their country in the moment of her agony. It may be that their self-abnegation only leaves room for the irreconcilable violence of anarchism and for the more sinister intrusion of the military adventurer. The perpetual surrender of doctrinaire theories and personal ambitions would be the best sacrifice that Spaniards could lay upon the altar of patriotism.

The scene, when the Queen Regent led the young Sovereign into the presence of the Cortes and threw the throne and nation upon the protection of their united loyalty, will take its place among the touching pictures of history. One would think that every remnant of ancient Spanish chivalry would have responded to that stirring and pathetic appeal. It moves even English blood by its resemblance to the strangely parallel incident in our own history. Under like circumstances of distress and disunion, Elizabeth at Tilbury summoned a divided people to rally for England's

sake to her support. We remember how Catholic and Puritan, in the presence of the nation's danger, responded to the appeal, abandoning their plots and forgetting their grievances. In that stern hour, when the Spanish terror threatened to overwhelm the rising nation, Elizabeth became for the first time truly Queen of England. The mighty flood rolled away harmlessly, leaving deep and forever consolidated the foundations of English national unity.

Spain is not England. English union has sprung and strengthened from the root of liberty in religious thought and political action, the very root which Spain, in the same period, was only too successfully extirpating from her soil. This bitter hour might bring home to Spaniards the words which the sublime genius of Schiller put into the mouth of King Philip II.:

> "The world is still, for one short evening, mine,
> And this same evening will I so employ,
> That no reformer, yet to come, shall reap
> Another harvest, in the waste I'll leave,
> For ten long generations after me."

The prophecy has worked its full accomplishment. After ten generations of self-wrought decay, Spain is reduced to vital extremity by the descendants of the conquerors of the Armada. Is it vain to hope that at last external pressure may produce consolidating effects upon her restless and disunited people? If her sovereign's appeal is responded to by her subjects, as Englishmen responded to Elizabeth at Tilbury, thanksgiving will arise not only among the friends of Spain but from every true believer in the cause of constitutional Government and every lover of the happiness and progress of nations. Such results might well reconcile Spain to the sufferings she must undergo and incline her well-wishers to forgive any technical wrong that may have been done her by the institution and in the course of the war.

There is an apparent harshness in the fate which tears from the lingering grasp of Spain her last possession in that New World which her adventurous discoverers first made known. It may seem more cruel yet to find the young nation which Spain helped to nurse into independent existence wielding the severing sword. The righteousness of the sentence is not to be judged by the virtue of the executioner. There is a justice which cries up from the ground. By the sword Spain loses that which she had won by a still more ruthless sword. Spaniards wrestle with the sons of

Spaniards over a soil once cruelly drenched with the blood and sweat of its primitive possessors.

It is true that within this century Spain has made great advances. She has become tolerant and constitutional. She had learned the necessity of applying a liberal system to her remaining American colonies. It is upon those who are displaying this new and liberal spirit that the long accumulating wrath has fallen. But so has it always been meted, since upon the Jews of the first century, Christian and Pharisee alike, fell the blood of all the prophets. The mild Louis the Sixteenth paid the iniquities of all the Louis. Liberal England was left to sign the bitter bond that recorded the severance, wrought by the folly of the last English king who aimed at being an absolutist. It is in the nature of things that great popular movements of opinion should produce their effects often too late; after judgment, once just, has been transmuted, by the progress of events, into untimely prejudice. The wave that rises slowly under the wind, works destruction on distant shores long after the originating impulse has subsided.

The loss of Spain's last colony may prove to be a kindness cruelly dealt. It was an ill-fated gift which the genius of Christopher Columbus, the enterprise of her mariners, and the skill of her soldiers brought to their nation. The mastery of the Indies set her upon a false course. It introduced into her bosom the taint of avarice and nourished in prince and people the lust of oppression. The possession of a colonial empire kept alive the worst influences in Spanish government. Where a carcase is the eagles will gather. Colonial offices offer prizes to self-seeking adventurers, who perturb government at home with the prospect of being quieted with lucrative opportunities at a safe distance. Freedom of speech—of the press, of Parliament—is the only defence against the corrupt use of the power by the agents of power, particularly in distant possessions. Corruption is a jackal that feeds at the heels of oppression. Sooner or later the jackal gnaws the sinews of the lion. Far gone is the condition of a nation when from that infection even the military profession is not free. It has been alleged that the corruption of Spanish generals, profiting perhaps by falsified pay rolls, will be found to account for the extraordinary prolongation of the Cuban war of rebellion.

As the result of the war the Colonial Empire comes to an end. The lusts that it fed, the corruptions that it engendered, perish with it.

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It is not nations that fall but systems. Though ruin has come upon the house founded upon the sands, the people live and may build again more wisely. If there is in Spain any saving salt of honest public spirit this will be its opportunity to purge the Government from the corruptions which have brought it, step by step, and generation after generation, down to the present stage of decay.

Great Britain, taught by her errors, and fortified by her losses, after the separation of her first colonies, consolidated her system of free Government, and set about building up a grander empire on the new principles in which we participate to-day. Thus nations like men, may rise on stepping-stones of their dead selves to higher things. Let us hope that we may see Spain, humbled in the unprofitable pride of power, take counsel of her ancient courage, and begin once more, in the vigour of her purification, and in her regeneration unashamed, to take her place with honour before the old world and the new.

PROVISIONS OF THE BRITISH NORTH AMERICA ACT FOR UNIFORMITY OF PROVINCIAL LAWS.

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Without pausing at the threshold to verify the assumption, I shall take it for granted that one of the prime objects of this association is to bring about an improvement in the form, if not in the substance, of the laws administered throughout the Dominion.

The substance of those laws, in Canada, as in every other democratic community, must depend upon the varying opinions and sentiments of the people, for which lawyers as such have no more claim to speak than any other class or profession. But the formal statement of the law, and the procedure by which its provisions are to be made effective, constitute the specialty of our profession, and no man can claim to have discharged his full duty as a member of that profession who has not, according to the measure of his ability and opportunity, endeavoured to make those formal statements and methods of procedure more clear and simple than he found them.

I know nothing that would entitle me to speak of the conditions prevailing in the province of Quebec. Our constitutional act bears witness to the tenacity with which the people of that province adhere to the principles that underlie the system they inherit, and the procedure to which they have been accustomed. Far be it from me to comment upon this disposition, to deprecate the perpetuation of that system or the constitutional provisions with respect to it, which were a necessary feature of the federal principle upon which our Union was established. But I suppose that the stoutest champion of the peculiar institutions of Quebec will concede that, however admirable and excellent the laws and procedure of that province may be, their excellency is not such as absolutely to preclude the possibility of improvement.

Of the conditions prevailing in the English-speaking provinces, I may speak with greater boldness. Our English law has been the subject of much exposition and no little criticism. It has been described as a medley of ancient customs, handed down

from the days of the feudal system, of badly assimilated excerpts from the civil law, borrowed without perfect intelligence, and with no acknowledgment at all, but put forth as the spontaneous and all but inspired wisdom of the Bench, slowly and spasmodically modified from time to time according to the caprice of individual judges, disfigured by the anomalies, and clouded by the uncertainties attendant upon such a course of development, depending in great measure upon the sheer accidents of litigation, and exhibiting only such marks of intelligent design as are apparent here and there in the haphazard results of desultory and patchwork legislation. "Chaos tempered by Fisher's Digest," is the witty description that has been applied to our system of common law. But the expression presents a partial and one-sided view of the matter. For, after all, anomalous as is our system in many of its features, defective as it must be conceded to be, in many respects in which it might without difficulty be amended, it is, nevertheless, but the natural and inevitable expression of what is most characteristic of us as a nation.

Our common law, or to speak more broadly, our whole body of positive law made up of common law principles and the modifications effected by legislation, from time to time, has, no doubt, its many curious and costly anomalies, its unquestionable incongruities and absurdities, but those who would bring a railing accusation against it, should remember that it embodies Magna Charta and habeas corpus among its provisions, that the petition of Right and the Bill of Rights have been wrought into its fabric, that it recognizes Free Thought and guarantees Free Speech, that the independence of the Bench, and the subordination of the army, bear witness to its crowning distinction as the expression of government by law, rather than by force, and finally that in the course of its steady and progressive development, it has become the formal embodiment and expression of a system which amid all the disquietude and uncertainty, the shadows and clouds and darkness that gather about the dynasties and governments of the continent of Europe, presents to the world the inspiring and assuring spectacle of a throne "broad based upon the people's will and compassed by the inviolate sea."

But while all this is a good enough answer to the cavils of the flippant and superficial detractor, it is no answer at all to the critic who pleads the necessity for reform. The voice that calls for amendment and reform, is as genuine an expression of national

character as are the conditions against which that voice is raised, and it is for the purpose of giving direction and effect to the call for improvement that this Association has, among other wise purposes, been established.

We have at this moment no less than seven fully organized legislatures, all clothed with plenary authority in their respective jurisdictions, and each of them, subject of course to veto provisions that need not be enlarged upon, having full power within the territorial sphere of its operations to change materially the framework of our social system. These bodies, although frequently accused of a pernicious activity, are by no means as active in their legislative capacity as they might be, or as there might have been some grounds for supposing that they would be. It is a comparatively rare thing for them to meddle in a radical way with the groundwork of our legal system. A wholesome consciousness of the complexity and difficulty of the task, a dread of the unknown and unknowable consequences of meddling with the fundamental principles governing our social and domestic relations, the knowledge that legislation of such a character is the proper work of experts, who do not, in too great number, find their way into representative assemblies, the bad luck that has sometimes attended the experiments of reformers, with more zeal than wisdom, who have occasionally tried their hands at tasks of such dimension and character, and last but not least, the *vis inertiae* to which, however far from commendable it may be, in itself, we often owe many of the best blessings of life, all these causes have had a deterrent effect upon our provincial legislatures, and have led them to confine themselves to legislation which, however important and necessary, has not been of a revolutionary or radical nature.

Within these limitations they have all been busily engaged in legislating on the same class of subjects, and have produced enactments that are many of them so much alike in all their leading outlines that the question has occurred to many persons why there should be any difference at all. On many subjects the provisions of their laws are in most, if not all of the provinces, exactly alike, or at least they are intended so to be, for on several subjects the intention of most, if not all of them, has been to adopt the law of England as it stands. Those cardinal provisions of the statute of frauds which govern the validity and authentication of contracts will do for a sample illustration. There may be slight verbal difference between the reproductions of these clauses in the differ-

ent provinces, but these have probably been unintentional. The design has been to adopt these provisions from the English statute book, in their entirety, without the change of a word or a syllable. And it would have been unwise to depart even in the smallest particular from the phraseology of an act almost every significant word of which has received its construction through a long course of litigation and decision.

The same thing is true of many other provisions taken from the English statute book, notably in connection with the law of wills and the law of evidence. These provisions have been extracted from the English statute book without the change of a single word, and this method of legislating has been pursued even to the incorporation of the mistakes and blemishes of English legislation. In some provinces, for example, we have adopted the provisions of the original Factors' and Brokers' Acts, which have remained unamended upon our statute book for many years after the anomalous character of those provisions had been discovered and amended by appropriate legislation in the Old Country. In other provinces we have allowed provisions of the statute of frauds to remain upon our statute book for many years after they had been properly modified by amending legislation in England; cases also have been discovered in which, while we have accidentally escaped, in our own copying, the mistake of the British draftsman, we have introduced confusion worse than that of the original English blunder, by re-enacting here the English amending legislation, the sole purpose of which was to correct the mistake which our copyist had not followed. These things are among the curiosities of legislation which will furnish a fruitful theme to some future commentator, and upon which we need not at present linger.

On the whole we have not gone far wrong in our adoption of English statutes. My impression is that we might well have gone farther in this direction, and that we might still go farther in following the lead of the skilled and accomplished draftsmen who have done so much for the simplification and improvement of the English statute book. Whenever an act has been adopted in England for the purpose of drawing out in succinct and definite terms the principles and doctrines applicable to any particular subject or class of subjects, and that act has, after the experience of years, been proved to be a lucid and accurate statement of the law, we can avoid much uncertainty and avail our-

selves of many advantages by making it a part of our own body of statute law. These conditions had, no doubt, been fulfilled in respect to the English act for the codification of the law relating to bills and notes, when ten years ago, or thereabouts, it was pointed out in a series of letters in the Toronto Mail what great advantages would be gained for us in point of certainty, lucidity and uniformity, if our own Dominion Parliament would at once proceed to re-enact the provisions of this statute here. The act was introduced by Sir John Thompson in the following session of Parliament and, after a twelve months' incubation, became the law of Canada in 1890. It was slightly amended in the following year, and has remained upon the statute book ever since without the change of a single word or letter, and I am quite certain there is not a merchant, a banker or a lawyer who would now consent to its being repealed. Whether the requisite conditions have been fulfilled with respect to the Sale of Goods Act, and the act to codify the law of partnership, may still be a debatable point. All that I wish to emphasize is the very great advantage that it will be to us whenever the time shall arrive at which we can with safety adopt in all the provinces the provisions of these codifying acts.

There are other subjects on which we have not copied the provisions of the English legislation in terms, but, the subjects of legislation being the same, the mischiefs of the common law being the same here as in England, the remedies for those mischiefs being, for this reason, necessarily similar there and here, we have followed the general course of English legislation without intending or attempting to conform to the phraseology of English enactments. In such cases as these, by our partial adoption of the terms of English statutes, thanks to the inventive ingenuity of our own legislators, to our method of borrowing one from another, and our great freedom in tinkering what we have undertaken to borrow, we have created a body of statute law which cannot be read continuously without producing the sensation of nightmare.

The law for the prevention of frauds on creditors by secret bills of sale, or as it may be otherwise better known, for the filing or registration of chattel mortgages, presents provisions of this character. The cleverest practitioners that we have in my own province have been at their wits' end to know how to make sure that they were complying with its provisions. Our courts have pronounced diametrically opposite decisions upon some of its

clauses. One section, as it appears in the Ontario statute book, and in a slightly modified form in the statute book of Nova Scotia, contains a sentence of not less than three hundred and sixty-three words, with no pause longer than a comma, with all manner of side-tracks and switches in the nature of subordinate and qualifying clauses, to distract the attention and confuse the intellect of the reader. I recall an occasion on which one of our most impulsive judges, after a long argument on the section at the Bar, seized the volume and attempted, in his characteristic manner, to take it with a rush, but was gently cautioned away by the counsel who was endeavouring to elucidate the matter, with the reminder that while there were some spirits that could be more easily exorcised, there was a kind that went not out without prayer and fasting.

I have thus far spoken of cases in which our statute law is absolutely identical in most of the provinces, and of those in which it is substantially similar in one or more. There remains to be considered the class of cases in which, although all the conditions and requirements in the various provinces are precisely similar, there has been no attempt, either by copying from a common pattern, or by borrowing from one another, to secure anything approaching to similarity in the laws of the several provinces, cases in other words in which, while the laws of the various provinces might as well as not, for all that can be suggested to the contrary, be exactly alike, there is every conceivable variety of provision made in the enactments of the different legislatures.

Now as to all these cases it is not to be denied that a plausible argument may be made for the condition of things as it exists. Plausible arguments always can be made for the existing conditions, but those arguments partake rather of the nature of apologies than of vindications. So far from deprecating the want of uniformity in the laws of the several provinces, we may be reminded how greatly we should value, not only the intrinsic charm of such variety, as a mere matter of aesthetic contemplation, but likewise its great utility as a process of legislative experimentation, and the results that must be obtainable from such efforts, in the field of comparative jurisprudence. All this and more could be urged by the plausible apologist for the existing conditions. But I make bold to say that viewed at closer range, these apologetic suggestions will not bear inspection.

Let us view them for a moment in the light of a few very simple and homely illustrations. Take, for example, the compara-

tively trivial matter of the computation of time, whether for the purposes of substantive law or in connection with the procedure and practice of the courts. We know pretty well what a month means, at least when the expression occurs in a statute, for most of our statute books have removed all doubt by declaring that the calendar shall control the matter. But we do not always know what is meant by a day, at all events, where more than one day is to be accounted for. There is not a statute book in Canada that will not, by the diversity of its provisions, require the practitioner to be more or less wary lest he fall into a trap, and expose his client to serious loss, by a failure to compute correctly a given number of days. Shall he exclude the first day and include the last? Shall he include both the first and the last? What precise form of words will indicate the one or the other method of computation ? Shall Sunday be included or excluded in the reckoning? At what hour shall the juridical day be considered at an end ? What shall be the effect of an act in the law performed after the close of the juridical day ? At what hour of the day must rent be paid or goods delivered ?

These and other questions can all of them be asked in respect to this apparently simple and intrinsically trivial matter, and you may find as many different methods of computation as there are questions, that are possible to suggest. Now, why should there not be absolute uniformity and unclouded certainty, in a matter of such obvious simplicity ? Why should a practitioner, loaded down with the weightier matters of the law, be obliged to lay down for the moment his burden, while he proceeds to tithe the mint, anise and cummin of such utter trivialities? Why should a man with an immortal soul be asked to turn up a statute and a practice book, before answering so simple a question, at the risk, it may be, of having a judgment set aside, or a trial postponed, or an appeal dismissed? Why should not ten days mean always and everywhere the same portion of time, whether for service of a writ, or for the giving of a notice of trial, or for the filing of a factum, or for moving a *rule nisi*, or for any similar purpose for which it is necessary that time should be computed ? I have chosen a small and trivial matter comparatively for the very reason that it is small and trivial, as the one most suitable for the purpose of illustration.

Take, again, the matter of verifying the execution of a document, whether for use in a court as evidence, or for the purpose of registering as notice of title. This is a matter of very obvious

inter-provincial interest. While men are going to and fro in the earth, it must constantly happen that documents have to be executed in one province which it is absolutely necessary should be registered in another, and that evidence which exists in one province should be required for use in litigation proceeding in the courts of another. The law of the situs in the one case and that of the forum in the other, require a compliance with the law of the province in which the document is to be produced or registered, as the case may be. We have the same classes of officials in all the various provinces. We have justices as thick as blackberries in some of them, and of notaries public all that should reasonably be required. Can anyone suggest a reason why there should not be some simple and uniform method of authentication which would be equally applicable, and equally effective in every province of the Dominion.

But why stop with mere questions of procedure? Take the subject of domestic relations and the rights of property dependent on the relations of domestic life. Can anybody suggest a valid reason why the position of a married woman with respect to her interest in her husband's property, or her control over her own, should be different in Ontario and Nova Scotia, in New Brunswick and in British Columbia? Or let us go still further, can any one suggest even a plausible reason why a degree of emancipation from the doctrines and fictions of the common law in regard to these rights and relations, which is not deemed too advanced and radical for the conservative legislators of the British House of Commons, should be regarded as too advanced for the far less complex conditions existing in the communities of this Western World? If not, what harm could arise from the application throughout the several provinces of the Dominion, of the provisions of the Married Woman's Property Acts of England, and the repeal of the incongruous and conflicting provisions of the law that disfigure the statute books of the several provinces?

What is true as to this topic is true *a fortiori* of the law as to the devolution of real estate, and the distribution of personalty. Human nature is the same thing in Ontario that it is in Nova Scotia. Parental and conjugal affection, filial duty and brotherly regard, are the same things in Halifax and in Vancouver, the same on the banks of the Saskatchewan and along the valley of the St. Lawrence. All the material relationships of life, of which our legal systems and doctrines are but the outward and formal

expressions, are essentially the same throughout the whole Dominion, and nothing but confusion, inconvenience and expense can result from the diversities and incongruities which, for thirty years of our life as a Confederation, we have as carefully maintained as if the salvation of the country depended upon their preservation.

We may well believe that the continuance of these conditions was not in the thought of the founders of the Union. They took care to provide for better conditions in the only way consistent with the general scheme of confederation rendered necessary by the circumstances in which they did their work. Article 94 of the Constitutional Act contains the provision with which we are all familiar, that, "notwithstanding anything in this act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such act shall, notwithstanding anything in this act, be unrestricted; but any act of the Parliament of Canada, making provision for such uniformity, shall not have effect in any province unless it is adopted and enacted as law by the legislature thereof."

It is very greatly to be regretted that the terms under which Manitoba, British Columbia and Prince Edward Island were admitted into the union, make it extremely doubtful whether these provisions extend to any of those provinces. I am afraid it is hardly even doubtful that they are excluded. I cannot believe that their exclusion was the result of deliberate intention, but the conditions in Manitoba at the time of its admission would make it very difficult to present any argument, founded upon those conditions, which would control the grammatical reading of the act to provide for the government of that province. By the terms of that act the operation of this provision seems to be expressly excluded, and the terms of the act respecting Manitoba are substantially similar to those under which the other provinces have been admitted.*

Even subject to these limitations, the advantages to be derived from such an assimilation of provincial laws as the Par-

* It is open to question whether this statement is strictly correct. The expressions used are not very clear.—B.R.

liament of Canada, with the co-operation of the provinces, is petent to effect, are too manifest to require any demonst From the layman's point of view, the advantage that appear striking and obvious is that by such an assimilation the la comes more accessible and ascertainable. To the lawyer the greatest advantages that would result from the reform be the increased and ever-increasing certainty. The larg field over which a statute operates the more quickly its ter come defined. Each province has the benefit of the results at by the labours of advocates and judges in every other pro Authorities multiply, doubtful points are made certain, obsc are cleared, inelegancies and incongruities are brought to ligh removed by the requisite legislation, and the law becomes simple, more uniform, more certain, and more conforma every way to the ideal with which all laws in the very na things should be made as closely as possible to correspond.

The advantages that would result from such an assim are so manifest and so manifold that it is greatly to be wo at, not only that the provisions of this section have not ye brought into practical effect, but that in all the thirty years history as a Dominion, no responsible public man has ever far as I am aware, seriously addressed himself to the t bringing them into effect. There are many reasons for this. viously to the establishment of this society, there has been n favourable opportunity for the exchange of views amon Bars of the several provinces, and thus one of the most pote effective influences making for the improvement of the e conditions has been almost wholly inoperative. Certainly, the first conditions to the success of any movement in this tion must be the creation of a strong and clear conviction desirability in the mind of the profession throughout the co But while this is one of the conditions precedent to the s of such a project, it is unfortunately not the only one. A greater difficulty in the way will be realized in the utter ciency and unsuitableness of the Dominion Parliament, w present methods and maxims, for the prosecution of su undertaking. Much smaller and simpler undertakings, in th of law reform, than what is now proposed, have already prov strong for the digestion of the House of Commons.

We have had an object lesson recently afforded to us nature of the difficulty now under consideration, in the pro

or perhaps I had better say, the want of progress of Mr. Fortin's Insolvent Bill. Nobody can reasonably deny the necessity for an insolvent act of some kind, for no commercial nation can well exist without some sort of a law of bankruptcy. The subject of bankruptcy and insolvency is expressly assigned to the Dominion Parliament, and that Parliament legislated upon the matter in 1869, and again in 1875. Since the repeal of the later statute, there has been no insolvency law, properly so-called, in effect throughout the Dominion. But so keenly has the need of some such law been felt, that in the absence of Dominion legislation, the various provinces have been obliged to do the best they could to supply the place.

Thanks to the liberal construction placed upon the description of provincial powers in the British North America Act, and to the ingenuity of the lawyers in the Ontario Assembly, the provincial legislatures, or some of them, have managed, by sailing pretty close to the wind, it must be candidly confessed, to produce a statute which the courts have, by what some persons have thought was rather a *tour de force*, been able to sustain, which does in fact fulfil many of the requirements of an insolvent law. The existence of these statutes proves the necessity for such a law. The fact that they exist in some provinces, and not in all, shows the inconvenience of occupying the field intended for Dominion legislation by straining the powers of the provincial legislatures. We shall always, under this method of legislation, be subjected to the inconvenience, or at least the risk, of having as many different kinds of law as there are different provinces in which it may be enacted. Apart from the advantage of uniformity, to which I have already alluded, there are special reasons that call for uniformity in the provisions of the law relating to bankruptcy and insolvency.

This is one of the subjects in which foreign nations are, perhaps, even more deeply interested than the people of our own Dominion, and it is therefore a subject upon which, above all others, the laws of the whole Dominion should be uniform. When a merchant in London or Berlin, or it may be in Australia, or Hong-Kong, desires to know what security he will have that his goods will not be taken to pay the home creditors of his debtor, and leave the foreigner in the lurch, it must be obvious that it would be of the very greatest importance that he should be able to deal with the Dominion as a unit. It must be perplexing and exasperating to him, in the extreme, to be obliged to consult six or seven different

statute books, or, still worse, to realize that his legal adv
obliged to take a preliminary course in the geography of C
before he can even put himself in a position to prepare to
him on the legal merits of his enquiry. It is not creditabl
country, as far advanced in civilization as Canada, on whc
half the claim of nationhood has been so prominently and e
tically asserted, that it should present to the rest of the wo
respect to this question, the spectacle that it does. This ha
felt by many persons for years past, and yet the same relu
has been felt in dealing with the question in the Dominion
ment, no matter what party has been nominally in control
House of Commons.

Why is it that so much difficulty is experienced in c
with what is apparently so simple a matter, and securing t
actment of a law of such evident and admitted necessity ?
answer is not difficult. Experience has shown that under p
conditions, no important and debatable measure can pa
House of Commons except under the patronage of the G
ment for the time being. The fate of more than one meas
intrinsic excellence has illustrated the truth of this remarl
truth did not need to be demonstrated, for it is one of the co
places of parliamentary philosophy. Now the conditions
which a measure can be taken under the patronage of the g
ment are extremely stringent. The party system makes
duty of an opposition to oppose. We have, indeed, bee
during the present session, that it is their duty to suspect
thing wrong even where nothing whatever of a questionable
acter is apparent, to maintain at all times that "spirit of w
jealousy" that Matthew Arnold used to satirize so cleve
displayed by the narrower organs of religious opinion in En

For the purposes of a government measure, on any
debatable question, you must first of all begin by setting a
body of representatives, numbering usually almost half c
whole membership of the House. Now, if it were possible to
this process to its logical conclusion and throw the proscribe
out of the reckoning altogether, it would be quite a simple
to get things done. A majority of those that were left could
the desired measures to a successful issue. But that is just
the difficulty arises. This cannot be done. If there is an
siderable minority of the membership, on the government
the House, to whom a proposed measure is distasteful, that

end of the matter. No government can depend upon carrying its measures through the House with the votes of the opposition, and hence it is necessary that after reckoning against you nearly half the membership of the House of Commons, your measure must be such as to secure enough votes among those that remain to command a majority of the whole House.

These are certainly hard conditions. Not one measure in five that could be named as meritorious, if not essential to the good government of the country, can stand such a test as this. A measure may be such as should commend itself to the unbiased judgment of the overwhelming majority of the members of the House of Commons. It may be such as the overwhelming public opinion of the country would approve. I may be altogether mistaken, but I am under the impression that Mr. Fortin's Bill complies with both of these conditions. Nevertheless, it may not be such a measure as a government under our system would be justified in venturing to introduce. Differences of opinion may exist, and in respect to this particular measure, differences of opinion probably do exist, of such a character as to deprive it of the support of an influential minority of the members on the government side of the House, and leave it dependent for its success upon the votes of the opposition. No government, whether Liberal or Tory, will willingly expose itself to the risks of such a situation, and hence, wherever the party system prevails, it must always be the case that measures of the greatest possible importance and utility must depend on the initiative of individual members, and the support of an unorganized majority of the House.

Left to this independent initiative and this unorganized support, we may easily anticipate the fate of the measure that comes forward under such depressing auspices. The absorbing nature of party struggles in a House composed exclusively of party politicians and representing a constituency in which it is the received maxim that politics is war, the imperious claim of party controversy, to engross the whole energy of the members, and consume all the available time of the House, make it at present practically impossible to secure the time and attention requisite for the adequate consideration of any measure, no matter how interesting or important it may be, which does not directly or indirectly affect the fate of the administration. Parliamentary authorities and publicists of eminence have frequently bewailed the existence of these conditions.

The remedy is easy to suggest, but it is not safe to predict it will ever be adopted. There are enough lawyers in the H unconnected with the administration of the government to for very strong and able committee to whom such measures, o non-political character, as I have mentioned, might well be refe for consideration. On the government side of the House, t is always much of course to engage the attention of members side of their duties as legislators, but even on the government there are a number of men representing small and not too exac constituencies, who could easily find time for the full and ca consideration of such subjects. On the opposition side of House, the members enjoy a happy immunity from the cares worriments that always beset, more or less, the supporter of party in power, and there must be a number of able and acco lished lawyers among them to whom it would be a blessed r from the ennui of a long parliamentary session, to find some useful occupation for their vacant hours. Left to their devices, these honourable members must prove, to the greate less inconvenience of the gentlemen on the Treasury Benches truth of the saying that "Satan finds some mischief still for hands to do."

If I were the government I would consider it an exce idea to give these members some serviceable tasks of public u to perform that would leave them as little time as possible, certainly much less temptation than they have at present hatching schemes for the annoyance of the administration would select a strong committee from among the lawyers o House, without respect to party distinctions and with a sole re to their known ability and knowledge as lawyers, and their sumable skill and judgment as draftsmen and legislators. I sh let them do their work as a grand committee of the House, the certainty that the results would justify a very large degr confidence in the wisdom of their conclusions, and, wit accepting any responsibility as an administration for the end ment of their proposals by the House as a whole, I should s it that a sufficient portion of the time that is now wasted in d and meaningless debate, in long and wearisome harangues t gallery, as represented by the Hansard reporters, should devoted to the reasonably full and fair consideration of proje public utility and permanent interest, brought forward a results of the committee's labour.

By the adoption of some such expedient as this, the House of Commons could be made a most efficient instrument of the reformation of the law. The active and friendly co-operation of such a society as this could be confidently depended upon. The approval of the public, or so much of them as would be naturally interested in tasks of this character, would be cordially given to the undertaking, and we should have at length some reasonable hope of the eventual realization of the time foreshadowed by Cicero in a passage quoted long ago by Lord Mansfield, and borrowed from him at a later day by Mr. Justice Story:

"Non erit alia lex Romae alia Athenis, alia nunc alia posthac set et apud omnes gentes et omni tempore una eademque lex obtinebit."

CONCERNING CORONERS AND CORONERS' INQUESTS.

By J. E. Farewell, Q.C., Whitby, Ontario.

The office of a Coroner is of so great antiquity that its commencement is not known. The holders of the office in modern days preserve the fitness of things by living long in the land. The office existed in King Athelstan's time. The officer has been known under various designations, Coronarius in the time of Richard the First, Coronator in the Magna Charta, Coroner in our Statutes and in the Scotch Law, and by the usage of country people he is a Crowner. Shakespeare, in Hamlet, makes one of the clowns speak of "Crowners' quest law."

The Coroner was for many years a most important officer in connection with the administration of Criminal Justice, particularly as to enquiries as to the cause of death of persons found dead or who had died under suspicious circumstances. Before the Magna Charta he could not only receive accusations as to offences but could try them; after that date upon the inquisition or finding of the Coroner's Jury, committal for trial followed, and the accused might have been put on his trial upon the finding of the Coroner's Jury, without a Bill having been found by the Grand Jury. Since the Criminal Code this cannot be done, neither can the Coroner on the findng of his jury commit the suspected person for trial, but only to a Justice of the Peace when all evidence material to the prosecution and that offered by the accused has to be taken.

It is important, in view of these changes, to consider whether the advantages of enquiries by a Coroner's Jury are sufficient to warrant the retention of this mode of eliciting information as to the commission of crime or whether some substitute can not be found by which the work can be better performed with less expense and circumlocution.

The necessity for enquiry "as to the cause of death where any person is slain or has suddenly died," is as great now as when the Statute as to the office of Coroner, 4 Edward First, was passed

The necessity of enquiry where the circumstances induce the belief that death has resulted from poisoning, starvation, or through the neglect or misconduct of other persons, in respect to death from the careless use of firearms, the deficient protection from accidents by machinery, by railway collisions and other disasters, the defective construction of modern buildings, overloading of steam vessels, is very great.

It was claimed that the practice of investigating the causes of sudden deaths was much abused, and that inquests were held when the sole advantage resulting from the investigation was the pecuniary advantage to the Coroner and his constable, while the families of the deceased persons were annoyed and harassed, and the time of the Jurors was wasted.

With a view to economy, the Legislature of Ontario has provided that the Coroner shall not be entitled to the fees for holding an inquest unless a declaration under oath be made by the Coroner prior to the summoning of the Jury, that from information received by him he is of opinion that there is reason for believing that deceased did not come to his death from natural causes or from mere accident or mischance, but came to his death from violence or unfair means or culpable or negligent conduct of others, requiring investigation by an inquest. This provision has very considerably lessened the number of inquests and the expenses of this department of Criminal Justice.

While this is commendable, the question is, has this saving been judicious and altogether contributory to the proper administration of the Criminal Law ?

Let us see how the matter works in practice. A sudden death is reported to a Coroner with little or no information as to the circumstances. If he visits the locality, no matter how distant, and finds on enquiry that it is a case of accidental death, or death from natural causes, there is no inquest, and there is no provision for payment of his travelling expenses, to say nothing of his time.

In the absence of information as to the circumstances, he is not likely to undertake a journey to make enquiries nor to make the affidavit required by the Statute before holding the inquest, and there is no investigation, although it may be a case in which it would have been highly proper to have held one.

If, however, in the absence of information he is rash enough to make the affidavit and issues his warrant, he may, on enquiry,

when he reaches the locus in quo, on being satisfied that inquest is not necessary, withdraw his warrant and receive ren eration for his travelling expenses and time.

If he lives near enough to the place of death and cons tiously makes an enquiry before commencing proceedings he bably applies to the very persons, who, if it was not a case of from natural causes or accident, were responsible for the d In which case the answers to be given have probably been fully considered before the commission of the crime, or at any before the Coroner's arrival. Unless the Coroner is fort enough, while making his enquiries, to meet with someone was a witness to the transaction or some person who knev business relations of the deceased, and the character of the pe who committed the offence, and who is courageous enough to him information, the probability is that the Coroner will d without evidence under oath, the very question which it is object of a Coroner's inquest to decide. The body is duly balmed, by a registered embalmer, arsenic and other substa which doubtless are the best preservatives of a dead body, an most destructive to a living one, are injected into the sto and intestines and down the throat of the deceased. The is buried. A suitable return is furnished to the Division Regi of deaths and the expenses of an inquest are saved. Weeks, haps months, afterwards, circumstances strongly tending to a crime has been committed are brought to the notice of authorities and an inquest is probably held when the body far decomposed that no valuable results can be obtained by a mortem examination. As a doctor once said to me, "about a can do is to smell the body." The holding of which inquest i time of Hale and Hawkins would have resulted in the impr ment of the Coroner. By this time many important circumsta which would have been fresh in the minds of witnesses at time of death, have been forgotten altogether, or the witn have or claim to have just such a hazy recollection of the facts quite sufficient for counsel for the defence to build up a cas doubt for perplexing the jury at the trial, for example, Reg Stearnaman.

The people of this Dominion are an active, restless pe and not attached to the soil as were the people in the days w Coroners' inquests were first established, and it frequently hap that persons who could have given material evidence at the

of death, in the ordinary course of events are far distant or have disappeared as if the earth had swallowed them up, or may have been induced by the friends of the accused to leave the country, by the time that suspicion as to foul play has been aroused.

Cases will occur, to almost every practitioner, where great expense has been incurred, and convictions have not been obtained because there was a failure to hold a strict investigation at the proper time: *e.g.*, Hyams Case.

The holding of a Coroner's inquest, where a crime has been committed, is a matter requiring much time and careful research. The Coroner's Jury, until recently, were not paid in this Province, and such payment is probably a new departure from the ordinary practice. Jurymen become impatient at the delays which to them seem needless, and the examination of many witnesses, who could probably have furnished important testimony, is dispensed with to the detriment of public interest. In a preliminary investigation before a Magistrate, the prosecuting counsel, if any is retained, having learned the bias of certain witnesses, may fear to call these witnesses, lest they should give adverse evidence without eliciting anything favourable to the prosecution, and if the witness succeeds in withholding facts, which should have been proved, he will not be within the jurisdiction at the trial, and his depositions will be read.

Is it absolutely necessary that investigations of this kind should be made by a Coroner's Jury, the members of which are often friends of the person who should be accused or friends of his relatives ?

Local Coroners' Juries, or certain members of them, I have no doubt, for these reasons, or because they were financially interested in the accused, have refused to find verdicts which the circumstances brought out in evidence required them to find in discharging their duty properly. A disagreement of the Jury or a verdict exonerating the accused from blame, affords a splendid certificate of character to the accused, on his subsequent trial, as being the honest opinion of a Jury of the neighbourhood, much better qualified to judge as to the circumstances than a Jury unacquainted with the character of the witnesses.

Why should not such investigation be held without a Jury, by some officer who has had experience in criminal matters, who is familiar with the law of evidence, and who has studied medical

jurisprudence, this officer being paid by salary, so that no qu as to prolonging the investigation for his own pecuniary adv could be imputed to him ? Why are Coroners generally do

The evil arising from the impatience of Jurors to have i gations closed would be done away with, and where Juro paid, this expense would also be saved. While Jurors are re it is just that they should be paid, but the fact that they are paid embarrasses the Crown Prosecutor and Coroner as to poning inquests, even where they have good ground for sup that additional information can be had by such adjournment

If investigations are held by one person, with pow examine witnesses under oath, all the advantages of an i are obtained and a postponement would not add to the e and would probably prove most advantageous in pro evidence.

The duties and practice of the officer known as the curator Fiscal, in Scotland, or the County Crown Attorney Province, suggest the proper person to have charge of su vestigations. When the investigations have progressed so fa point to the person to be accused, that person might be repre by counsel, and the evidence taken thereafter could be made at the trial in the event of death of witnesses. There would be ing of expense in this way. As matters are at present conduct County Crown Attorney is present at the investigation. T pense of the Coroner and the Jury would be saved. The ev might be taken by a shorthand writer with the advanta greater accuracy as to the statements actually made by wit The evidence need not be transcribed in the event of the i gation resulting in a finding that death was clearly due to ac mischance, or natural causes. The accused could have the to be represented by counsel, and evidence taken when he represented might, in the case of death, or absence from th vince, be used upon the trial.

When a sufficient case had been made for laying an inf tion, the accused could be arrested and brought before a trate, as in the case of a finding by a Coroner's Jury.

If it is advisable that the person to hold such investi should be a person skilled in medicine and surgery there be but one Coroner in a County or group of Counties, an person well versed in medical jurisprudence. The proceedin

vided by the Ontario Statutes, R.S.O., Cap. 275, is a practice analagous to the one above indicated. There a Justice of the Peace, on receiving a written request from any officer or agent of an Insurance Company, with security for costs, proceeds to hold an investigation as to the origin or cause of any fire, and has power to send for persons or papers and to examine all persons who appear before him on oath, etc.

It is submitted that the present system is unsatisfactory, the object being simply to obtain information, as to when, where, how and by what means the deceased came to his death, as no person can now be placed upon trial upon the finding of the Coroner's Jury, no matter how lengthy and exhaustive the proceedings may have been.

The presence of a Jury tends to prevent the thorough investigation of all the facts which should be enquired into.

The verdict of a Coroner's Jury, from local prejudice or interest, results at times injuriously to the accused or to the due administration of justice.

The requirements of the Statutes may prevent a conscientious Coroner from holding inquests at the time investigations should be held.

The evidence is often badly taken, either from the Coroner's misconception as to what is and what is not proper and important to be recorded, or because, owing to the age or infirmity of the Coroner, a clerk is often employed who has not the least experience or judgment as to what should be taken down.

When the evidence is read, the witness frequently denies having made the statements, or on noticing the effect of it, so amends it as to render it worthless.

Where proceedings are required to be taken on civil process against a Sheriff, the Coroner's services might be retained—one would suppose, however, that a Sheriff of an adjoining county would discharge the duty as well as a Coroner, and that the Statute might easily be amended giving him that power. It is submitted that the propriety of dispensing with the services of Coroners' Juries should receive the early attention of the Legislature.

TRANSACTIONS

OF THE

SECOND ANNUAL MEETING

OF THE

CANADIAN BAR ASSOCIATION.

HALIFAX, N.S., 31ST AUGUST, AND 1ST AND 2ND SEPTEMBER, 18

The first session of the second annual meeting of the Canadian Ba ciation was held at the Law Library of Dalhousie University, the Pre the Hon. J. E. Robidoux, Q. C., of Montreal, in the chair.

At the opening of the meeting the following programme was anno

TUESDAY, AUGUST 31ST.

Meeting at Library of Dalhousie University at 10 a.m.

1. Reading of minutes and reports from Treasurer and Secretary.
2. Address by the President, Hon. J. E. Robidoux, Q.C.
3. Enrolment of members.
4. General business.
5. Meeting at Legislative Council Chamber at 2 o'clock sharp.

Address of welcome by His Honor the Lieutenant-Governor to the ciation and members of the Behring Sea Commission ; to be followed b Don M. Dickenson, President of the Bar Society of Michigan, and a m and delegate from the American Bar Association.

6. At 3 o'clock, excursion on government steamer Newfield to P Basin and Arm, concluding with lunch at Lawlor's Island, as guests of t of Halifax.

WEDNESDAY, SEPTEMBER 1ST.

Meeting at Library of Dalhousie, 11 a.m.

1. Paper by O. A. Howland, of Toronto, M.P.P. Subject International Court."
2. Discussion.
3. General business.
4. Afternoon, 3 o'clock, drive through park and suburbs and past t ending by visit to the public gardens.

THURSDAY, SEPTEMBER 2ND.

Meeting at Dalhousie Library, 11 a.m.

1. Discussion on uniformity in registration and indexing of titles to land.

2 General business.

3. Afternoon, at 3 o'clock, meeting at Studley quoit grounds, as guests of Studley Quoit Club.

After the reading of the minutes and the Treasurer's report, the President delivered his annual address as follows :

GENTLEMEN,—This is the first time, since its foundation, that the Canadian Bar Association meets in regular convention, and its history is brief.

During the course of the Summer of 1896 the members of the association gathered together in the city of Montreal for the purpose of discussing the project and laying the foundations of our society. Representatives came from every part of Canada, and the bars of every province were, I may be allowed to say, brilliantly represented. The idea of forming one grand association of the members of all the bars in Canada was not a new one. For several years this idea had taken hold in the minds of a large number, but, until then, circumstances had not arisen to bring about the accomplishment of the project.

The bar of the United States had just met in Saratoga. The importance of the labors of their convention, the weighty questions which were then discussed, while adding new lustre to the American bar, attracted public attention, not only on this continent, but also in the countries of Europe. The bar on that occasion had fully demonstrated its power and its worth. England did not disdain to be represented at that meeting by a man who has no superior in the ranks of the English bar, the distinguished lawyer, and now an eminent Judge, Lord Russell.

The renown of that meeting, and the example given, there can be no doubt, contributed a good deal to determine the initiative taken by the leading lawyers of Canada of inviting the members of all the bars to a general convention in Montreal.

The idea of forming our association was not, however, carried out without meeting obstacles on the part of certain lawyers A fear existed in the minds of some of the lawyers of the Quebec bar that our association would ultimately undertake to impose uniformity of legislation on the people of Canada. and that the old French laws, to which the bar and the people of the province of Quebec are so profoundly attached, would be wiped out. Our friends of Quebec did not conceal their fears. The result was that our first convention was the witness of a long and animated discussion on the subject. This discussion, however, clearly proved that there was no intention anywhere to abolish our laws, and that, in any case, if our association desired to do so, it would be unable to succeed.

The question once settled, the members of the bar joined the movement, and applauded the creation of our association. To-day from one end of Canada to the other, the bar fully recognizes the need of such an association, and finds in its object nothing but that is praiseworthy ; nothing but that deserves the approbation and the encouragement of all.

What is, indeed, the object of our association ? It is to make of our bar a bar still greater. It is to create among all its members, whose minds have been given to the same studies, whose tastes are similar, whose education has been directed on the same lines, whose intellectual culture has brought together in the same world of ideas, it is, I repeat, to create between them, instead of purely professional relations, strong bonds of warm friendship. Our aim, then, can be resumed in one thought, which is altogether in the interest of civil society, and of agreeable social relations.

Our society has not only received the approbation of the militant portion

of the bar, but also commands the sympathy and good wishes of the
Of this we have already had ample proofs, for, last year, when, on the
separating, the judges of Montreal considered it a duty, and did us the
to grace our last meeting with their presence, Sir Alexandre Lacoste
Justice of the highest court in the province of Quebec, voicing the sen
of all, in an address admirable for its lofty ideas and its eloquence, offe
the felicitations, and gave us a masterly description of the grandeur and
ness of our enterprise. This sympathy from the bench is still fresh and

This need of large associations among the members of the same
sion and of the classes whose career is devoted to the acquisition of kno
seems in our day to be universally admitted. The human mind is too
and the field of study too vast to permit any single individual, without
of associates in the same science, to master it in its entirety.

This remark is to be applied more especially to the callings in
science makes new conquests every day, determines and settles pri
where our acquired experience is limited, and our notions crude and im
Who can fully appreciate the results of this collaboration on an extensiv
as a means of penetrating further into the arena of nature and science
to give you an actual instance of the value and importance attached t
collaboration, it suffices to mention the fact that we have on our shores
present moment a distinguished body of men representing two of the g
scientific associations of England. I allude to the British Medical Asso
and the British Association for the Advancement of Science, which h
feared to cross the ocean and visit Canada to pursue their labors amo
They come here to meet and mingle with our men of art and science,
make those interchanges of thought which are invaluable, and of whi
learned men of the world alone can enjoy the luxury and the
(Applause.)

The science of law is undoubtedly positive in its nature. Law is
of the will, pure and simple, whose interpretation is kept within
limits. But to have this interpretation wisely effected is it not necessa
the intellect should be well supplied by the study of the fundamental pri
of ethics and fortified by the close reading of the works of our great legi
jurisconsults? If an association like ours cannot follow these stu
common, at least we can by our moral influence and action induce the b
the different provinces to exact higher qualifications at the hands of tho
seek to become members thereof. And in this way our association b
useful in contributing to raise the standard of our profession.

In our day the bar deserves more than ever the attention and solici
the people. It has become a powerful factor in the accomplishment
destinies of nations. Modern civilization has substituted new ideas for
of the past. Among the civilized nations of the present century the te
is to settle differences, not by force of arms, but by arbitration. Th
seems at last to understand that if difficulties between individuals can be
without recourse to physical force, but by the free and conscientious e
of the judgment of a fellow man, the differences between nations shou
be settled by tribunals, that they, themselves, may select. We may, p
witness revolutions among civilized nations, but our hope is great t
twentieth century will see no more of these disastrous wars, which have
so much blood to flow during the course of this century. And to-da
words of the poet are truer than ever: "Cedant arma togae"

In these arbitrations the rights of nations will be upheld and de
not by soldiers and bayonets, but by the champions of thought and the
advocates of justice. What is now actually happening in your city of
is sufficient indication of the truth of my contention. A hundred years
Behring Sea difficulty would have brought about a conflict between two
greatest nations in the world. In our day the same two nations have

over the settlement of their difficulty to the forces of the human mind, and justice will be done in a greater degree than if the matter was left to the hazard of war or the unforeseen result of a battle.

And in passing allow me here to recall the fact that our Canadian bar won for itself, in the Behring Sea arbitration, a distinction and fame of which we may all well be proud. Among those who took part in that arbitration there were to be found members of our Canadian Bar Association, just as among those who are now engaged in bringing this matter to a final and friendly settlement, are also to be found members of our association.

The members of the bar are, moreover, called upon to play another important role in society. Politics seem to have for them an irresistible attraction. In the Legislature of the provinces and in the Federal Parliament of Canada it is, especially, lawyers who are to be seen in the first rank, and they are in their place. It is in order that those who are called upon to enact laws should be exercised beforehand in the study of law, and the more their mind and intelligence will have been formed by this study the better prepared they will be to fill the role of legislators.

Our association will afford the opportunity of becoming a public man of a more universal knowledge, and thereby fitting himself for the fulfilment of the weighty and responsible duties which are assigned to him by the confidence of his fellow citizens. Indeed, it is not to be expected that a lawyer who is in contact exclusively with the confreres of his own bar should become acquainted with the laws of the other provinces, or that he should scrutinize their statutes; he has neither the occasion nor the need to do so.

This work, which a lawyer would not undertake alone, he will do in our association, where committees are especially charged with studying the laws of the different provinces, so as to have the association as a whole benefit by the fruit of these labors. Our annual meeting will afford us a field where we will be able to reap, in a short time, an abundant harvest of knowledge that will be useful to all, and useful in the highest degree to the lawyer who is called upon to take part in the councils of the nation.

I have already said that the object of our association is to make our bar a still greater bar. Is that not, indeed, the result of our meeting, when the most distinguished members of our profession participate in its proceedings? The junior bar will find therein a subject of rivalry and good example to follow. The more numerous these meetings the greater the opportunity and incentive for them to put forth their best efforts and labors to secure a prominent position in their profession.

The horizon of the bar has therefore widened very much. It is only in our century, we may say, as least in certain countries, that they have attained this higher plane; but it is worthy of remark, as far as our own country is concerned, that there has been no important work, no remarkable progress accomplished without the lawyers taking an eminent part in them. And if we are allowed to assemble here, as representatives of the different bars of Canada, we are compelled to admit that the project of the Canadian confederation was, in a large measure, conceived and executed by the lawyers of the various provinces.

Even quite recently Canada has figured largely on the scene of Europe through the personality of her Prime Minister If Canada during the historic events of the past few months has occupied the first place among the colonies of the British empire, and also in the mind, not only of the British, but foreign statesmen, to whom can be attributed the honor and glory of her position if not to our distinguished confrere, the Right Hon. Sir Wilfrid Laurier? I make this statement knowing and feeling full well that even his political opponents would not pardon me if I were to overlook Mr. Laurier's name, when I am speaking of the mission accomplished by members of the Canadian bar for the advantage of our country. (Applause.)

If the bar has filled an important role in our country, if on another conti-

nent, and on more than one occasion, it has drawn to Canada the atte
and admiration of the old nations of Europe, how much should we ha
heart the ambition of continuing its proud traditions?

Our country, although holding a colonial position, is no longer a pa
portion of the empire, but it has been given a voice, and has becom
influence in the framing of the imperial policy, and the position which we
assumed alongside the other colonies makes it our duty to ascend the pa
progress and not remain stationary thereon.

Among the different classes of society whose duty it is to build u
country, there are none who should hold that duty more sacred than the
bers of the legal profession. And if we should fail in the accomplishm
that duty we would cease to be worthy of the eminent position in soci
freely accorded to us by our fellow citizens.

Let us, then, like our predecessors in the profession, contribute our
to make the annals of our country honourable and glorious. Our countr
prosperous one. Those who live here are satisfied with their condition.
love to dwell in a country where fortune smiles on us, but we love our f
land, not for its wealth, but for the glory which covers it.

One word more and I conclude. The year in which we now meet i
that will leave in the history of the empire an ineffaceable imprint. For
the year in which all the subjects of the British Empire rejoice over the si
anniversary of the reign of Her Gracious Majesty the Queen. The sixtiet
of a reign marked by the example of all the virtues which honor a woman, a
rendered illustrious by the wisdom of a Queen, made dear to her subjec
the respect of the rights of her people and her goodness toward them. A
echo the sentiments of all, I am sure, in giving expression to the admi
respect and love which the bar of Canada entertains for our gracious sove

I have said that one of the aims of our association was to create a
the members more intimate relations and stronger bonds of friendship.
object is already attained, for the reception which has been extended to
our friends of Halifax has been most cordial, and the pleasure we feel in
ing one another is most keen.

For my part I am especially gratified that the officers of our asso
decided to hold this convention in the city of Halifax, so attractive by i
torical souvenirs and so charming by its progressive modernism. (App

The Secretary's report was then read, and following it a committe
sisting of Messrs. C. B. Carter, Q.C., F. L. Beique, Q.C., G. F. Gregory
O. A. Howland, D. A. Mackinnon, B. Russell, Q.C., and R. L. Borden
was appointed to nominate special committees.

The meeting adjourned at 1 p.m.

At 2 p.m. the members of the Association met at the Legislative C
Chambers, where an address of welcome was given by His Honor the
tenant-Governor to the Association and to the members of the Behrin
Commission.

This address was followed by an address from the Hon. Don M. D
son, leading counsel for the United States before the Behring Sea Comm
President of the Bar Association of Michigan, and a member and de
from the American Bar Association.

At 3 o'clock an adjournment was had to the Government steamer "
field," which had been placed at the disposal of the Bar of Halifax f
occasion. A very enjoyable excursion was then had round Bedford Basi
up the North-West Arm, concluding with a luncheon at Lawlor's Islan
guests of the Bar of Halifax.

SECOND DAY'S PROCEEDINGS

At 11 a.m. the Association re-assembled in the library of Dalhousie University. The President in the chair.

Routine business was proceeded with, and recommendations made to the council with regard to the annual fee, the next meeting, and proceedings to be had thereat.

A resolution was then passed by which the number of the council, exclusive of the officers, was increased from 8 to 21.

It was then decided to postpone the reading of Mr. Howland's paper to the next morning at 11 a.m.

The meeting adjourned at 1 p.m.

At 3 o'clock the visiting members of the Association assembled at the Halifax Hotel, where carriages were in waiting. They were driven through the park, and suburbs, and public gardens, and afterwards were entertained at a reception by Mr. R. L. Borden, Q.C., and Mrs. Borden, at their residence, on the North-West Arm.

THIRD DAY'S PROCEEDINGS

The Association assembled at 10 o'clock in the library of Dalhousie University. The President in the chair.

After routine business, the Executive reported a by-law fixing the annual fee at $3, which was adopted.

Mr. O. A. Howland, of Toronto, then read his paper on "An International Court." On its conclusion, the thanks of the meeting were tendered to him for his valuable paper.

A committee for the nomination of officers for the ensuing year was then appointed, and a short adjournment took place in order to enable them to make their report.

Upon re-assembling this Committee and the Committee to nominate Special Committees reported, and the following officers and special committees were elected :—

HONORARY PRESIDENT. — Hon. Sir Oliver Mowat, K.C.M.G., Q.C., Ottawa, Lieutenant-Governor of Ontario.

PRESIDENT.—Hon J. E. Robidoux, Q.C., Montreal.

SECRETARY.—A. Falconer, Montreal.

TREASURER.—C. B. Carter, Q C., Montreal.

VICE-PRESIDENTS.—Hon. F. Langelier, Quebec; O. A. Howland, Toronto; C. S. Harrington, Q.C., Halifax; G. F. Gregory, Q.C., Fredericton; Hon. Fred. Peters, Q.C., Victoria; Aulay Morrison, M.P., New Westminster, B.C.; J. S. Ewart, Q.C., Winnipeg; Hon. F. W. G. Haultain, Q.C., Regina, N.W.T.

COUNCIL.—*Honorary Members*—Hon. David Mills, Q.C., Ottawa; Hon. Chas. Fitzpatrick, Q.C., M.P., Sol.-Gen., Ottawa.

Elected—Sir C. H. Tupper, Q.C., Victoria; Æmilius Irving, Q.C., Toronto; Hon. J. R. Gowan, Q.C., C.M.G., Barrie, Ont.; F. H. Chrysler, Q.C., Ottawa; Matthew Wilson, Q.C., Chatham, Ont.; D'Alton McCarthy, Q.C., Toronto; D. Macmaster, Q.C., Montreal; F. L. Beique, Q.C., Montreal; P. N. Martel, Q.C., Three Rivers; W. C. Languedoc, Q.C., Quebec; J. C

Noel, Q.C., Arthabaskaville ; F. B. Wade, Q.C., Bridgewater, N.S. ; G. Power, Halifax ; D. McNeil, Q.C., Halifax ; Hon. Wm. Pugsley, Q John, N.B. ; D. Mullin, St. John, N.B. ; Hon. L. H. Davies, Q.C., C J. T. Mellish, Charlottetown ; D. A. Mackinnon, Charlottetown ; E. V well, Victoria ; H. J. Macdonald, Q.C , Winnipeg.

COMMITTEE ON LEGAL PROCEDURE.—H. J. Macdonald, Q.C , peg ; F. L. Beique, Q.C., Montreal ; W. A. O. Morson, Q.C., Charlott Hon. Wm. Pugsley, Q.C., St. John ; F. H. Chrysler, Q.C., Ottawa Harrington, Q.C., Halifax.

COMMITTEE ON LAW REPORTING.—Jas. Kirby, Q.C., Montreal Trueman, St. John, N.B. ; F. T. Congdon, Halifax, N.S. ; R. G. Ottawa ; D. A. Mackinnon, Charlottetown, P.E.I.

COMMITTEE ON JURISPRUDENCE AND LAW REFORM.—Wm. Lo C., Toronto ; C. B. Carter, Q.C , Montreal ; D'Alton McCarthy Toronto ; H. C. Saint Pierre, Q.C., Montreal ; J. S. Ewart, Q.C , Win Arthur Drysdale, Q.C., Halifax.

COMMITTEE ON LEGAL EDUCATION.—Æmilius Irving, Q.C., To Arthur Globensky, Q.C., Montreal ; D. Macmaster, Q.C., Montre Russell, Q.C., Halifax ; J. T. Mellish, Charlottetown.

COMMITTEE ON COMPARATIVE LEGISLATION.—Sir L. H. Davies Ottawa ; O. A. Howland, Toronto ; F. Langelier, Q.C., Quebec ; D. M Q.C., Halifax ; R. E. Harris, Q.C., Halifax ; P. B. Mignault, Q.C., Mo Daniel Mullin, St. John, N.B.

COMMITTEE ON INTERNATIONAL LAW.—Sir Chas. H. Tupper, Halifax ; F. L. Beique, Q.C., Montreal ; Hon. F. Peters, Q.C., Charlott Aulay Morrison, New Westminster, B.C. ; Dr. R. C. Weldon, Q.C., H J. A. Gemmill, Ottawa ; O. A. Howland, Toronto.

COMMITTEE ON INSOLVENCY AND COMMERCIAL LAW.—F. Arno C., Toronto ; E. V. Bodwell, Victoria ; D. Macmaster, Q.C., Mo Hon. H. Archambeault, Q.C., Montreal ; G. F. Gregory, Q.C., Frederict L. Borden, Q.C., Halifax.

Resolutions were then passed expressing regret at the absence Henry Strong, Chief Justice of the Supreme Court, and Judge Baby, the Court of Appeals for Quebec ; and also congratulations to Sir Strong on his elevation to the Judicial Committee of the Privy Council.

At a meeting of the Council it was resolved that the next annual m should be held at Ottawa on or about the 1st May, 1898.

At 3 o'clock the members of the Association attended at the Studle club grounds as guests of the club.

TRANSACTIONS

OF THE

THIRD ANNUAL MEETING

OF THE

CANADIAN BAR ASSOCIATION.

OTTAWA, MAY 18TH AND 19TH, 1898.

The first session of the third annual meeting was opened at 11.15, at the Board of Trade Building. Owing to the absence of the President, the Hon. J. E. Robidoux, Q.C., through illness, Mr. O. A. Howland, Vice-President for Ontario, took the chair.

The following programme was then announced :—

WEDNESDAY, 18TH MAY.

Meeting at Board of Trade Room, Central Chambers, 11 a.m.

1. Reading of Minutes and Reports.
2. Address by the President, Hon. J. E. Robidoux, Q.C.
3. General Business.

3. p.m.—Meeting at Railway Committee Room, House of Commons.

1. Paper by Mr. B. Russell, Q.C., of Halifax. Subject—"The Provisions of the British North America Act for Uniformity of Provincial Laws."
2. Discussion of Paper.
3. General Business.

8 p.m.—Meeting at Railway Committee Room, House of Commons.

1. Paper by Mr. O. A. Howland, of Toronto. Subject—"Constitutional and International Aspects of the Spanish-American War."
2. Discussion of Paper.
3. General Business.

THURSDAY, 19TH MAY.

10 a.m.—Meeting at Board of Trade Rooms.

1. Paper by J. T. Mellish, Charlottetown.
2. General Business.

1. p.m.—Luncheon to visiting members at Hotel Victoria, Aylmer, as guests of the Bar of Ottawa.

The minutes of the last general meeting were read and confirmed the Secretary read the report of council, printed as an appendix hereto, was received and adopted.

The Treasurer then read his report showing a balance on hand of $1 to which was to be added $19, received since the closing of his accounts report was received. His report is also printed as an appendix hereto.

Letters were then read from His Excellency the Governor-Genera the Premier, Rt. Hon. Sir Wilfrid Laurier, regretting their inability to a the Association's meetings on account of other engagements.

A Committee was then elected to nominate officers and committees instructions to report at a subsequent meeting.

The following resolutions were then carried :—

Resolved: That this Association records its profound regret on acco the death of D'Alton McCarthy, Q C., M.P., a member of the Executive Association, which deprives the profession throughout Canada of one most distinguished ornaments, and cuts short a most brilliant public ca the Parliament of our country. That this Association desires the Cou convey to the bereaved family the assurance of the deep sympathy felt the members of the Association.

Resolved : That this Association expresses its deep sorrow for the of Harry Abbott, Q.C., of the Quebec Bar, a member of our Association has been taken away in the prime of life.

Several members spoke to both resolutions.

The second session met at 3 p.m. in the Railway Committee Room, H of Commons. Mr. Howland in the chair.

Owing to the fact that several members were necessarily detain business before the Supreme Court and in the House, the meeting adjo to 8 p.m.

At 8 p.m. the third session was held at the Railway Committee R Mr. Howland in the chair.

The meeting was opened by the chairman's calling on Mr. Russell t a paper written by him on "The Provisions of the British North Americ for uniformity of Provincial Laws." On its conclusion there was a disc participated in by several members.

Mr. Aulay Morrison, Vice-President for British Columbia, then too chair and called upon Mr. Howland, who read his paper entitled "Co tional and International Aspects of the Spanish-American War." As th was late discussion of this paper was postponed to next morning's sessio

THURSDAY, 19TH MAY, 1898.

The fourth session was held in the Board of Trade Building, at 1 Mr. Howland in the chair.

Mr. J. E. Farewell, Q.C., of Whitby, was called on and read his entitled "Concerning Coroners and Coroners' Inquests." On its conclu discussion took place on Mr. Howland's paper of the previous evenin Mr. Farewell's just read.

Discussion then took place with regard to the printing of the p

Finally it was resolved that the executive be recommended to print the proceedings and all papers read, and that the method of distribution be left to the executive. All papers to be subject to revision by their writers.

The nominating committee then presented its report of officers, which was accepted with a few changes. The list of officers finally determined on was as follows, and they were elected unanimously:

HON. PRESIDENT.—Rt. Hon. Sir Wilfrid Laurier, K.C.M.G., P.C, Ottawa.

PRESIDENT.—Æmilius Irving, Q.C., Toronto.

SECRETARY.—A. Falconer, Montreal.

TREASURER.—C. B. Carter, Q.C., Montreal.

VICE-PRESIDENTS.—Hon. J. E. Robidoux, Q.C., Montreal; B. Russell, Q.C., M.P., Halifax; Hon. J. R. Gowan, Q.C., C M.G., Barrie; G. F. Gregory, Q.C., Fredericton; D. A. Mackinnon, Charlottetown; E. V. Bodwell, Victoria; H. J. Macdonald, Q.C., Winnipeg; Hon. J. A. Lougheed, Q C., Calgary.

COUNCIL. — *Ex-officio* — Hon. David Mills, Q.C., Minister of Justice, Ottawa; Hon. Chas. Fitzpatrick, Q.C., M.P., Sol.-Gen., Ottawa.

Elected.—Hon. Sir C. H. Tupper, Q.C., Victoria; O. A. Howland, Toronto; Wm. Lount, Q.C., Toronto; F. H. Chrysler, Q C., Ottawa; J. E. Farewell, Q.C., Whitby; Matthew Wilson, Q.C., Chatham; D. Macmaster, Q.C., Montreal; F. L. Beique, Q.C., Montreal; Hon. C. A. Geoffrion, Q.C., Montreal; W. C. Languedoc, Q.C., Quebec; Hon. R. Dandurand, Montreal; R. L. Borden, Q.C., Halifax; F. B. Wade, Q.C., Bridgewater; C. S. Harrington, Q.C., Halifax; Hon. L. G. Power, Q.C., Halifax; Hon. Wm. Pugsley, Q.C., St. John, N.B.; C. A. Stockton, St. John, N.B.; Hon. L. H. Davies, Q.C., Ottawa; Hon. A. B. Warburton, Q.C., Charlottetown; W. S. Stewart, Q.C., Charlottetown; J. S. Ewart, Q.C., Winnipeg.

The Nominating Committee then reported names for Special Committees as follows, which were adopted:—

LEGAL EDUCATION.—Æmilius Irving, Q.C., Toronto; A. Globensky, Q.C., Montreal; D. Macmaster, Q.C., Montreal; B. Russell, Q.C., Halifax; J. T. Mellish, Charlottetown.

JURISPRUDENCE AND LAW REFORM.—J. S. Ewart, Q C., Winnipeg; C. B. Carter, Q.C., Montreal; Henry O'Brien, Toronto; H. C. St. Pierre, Q.C., Montreal; Wm. Lount, Q.C., Toronto; A. Drysdale, Q.C., Halifax.

LEGAL PROCEDURE.—H. A. Powell, Q.C., Sackville, N.B.; F. L. Beique, Q.C., Montreal; W. A. O. Morson, Q.C., Charlottetown; Hon. Wm. Pugsley, Q.C., St. John, N B.; F. H. Chrysler, Q.C., Ottawa; C. S. Harrington, Q.C., Halifax.

INSOLVENCY AND COMMERCIAL LAW.—F. Arnoldi, Q.C., Toronto; E. V. Bodwell, Victoria; D. Macmaster, Q.C., Montreal; Hon. H. Archambeault, Q.C., Montreal; G. F. Gregory, Q.C., Fredericton; R. L. Borden, Q.C., Halifax; J. Parker Thomas, Belleville.

LAW REPORTING.—F. T. Congdon, Halifax; A. J. Trueman, St. John, N.B.; Jas. Kirby, Q.C., Montreal; R. G. Code, Ottawa; D. A. Mackinnon, Charlottetown.

COMPARATIVE LEGISLATION.—B. Russell, Q.C., Halifax; O. A. Howland, Toronto; D. Mullin, St. John, N.B.; D. McNeil, Q.C., Halifax; R. E. Harris, Q.C., Halifax; P. B. Mignault, Q.C., Montreal.

INTERNATIONAL LAW.—Sir C. H. Tupper, Q.C., Victoria ; F. L. Q.C., Montreal ; F. Peters, Q.C., Victoria ; O. A. Howland, Toronto ; Morrison, New Westminster ; R. C. Weldon, Q.C., Halifax ; J. A. G Ottawa.

It was also resolved that the first member named in each case sh Convenor, and should be expected to obtain a report or paper for next m from his committee or some member thereof.

On motion of Senator Power, seconded by Mr. Chrysler, it was r "that the question of securing improvement in the method of admittin bers of the Bar of one province to membership in the Bar of another p be remitted to the committee on Comparative Legislation."

The following resolutions were then carried. *Resolved:* "That t meeting of the Association be held in Toronto at a date to be fixed executive." *Resolved:* "That in the opinion of this Association the ti come for another revision of the Dominion statutes, and that this resolu communicated to the Honorable the Minister of Justice." Carried discussion.

The meeting then adjourned to meet in the same place at 4 o'clock.

At the adjournment of the morning meeting cars were in waiting, a visiting members were conveyed to the Hotel Victoria, Aylmer, w luncheon was tendered them as guests of the Bar of Ottawa.

The chair was taken by Mr. W. D. Hogg, Q.C., Ottawa, the vice-ch Messrs M. J. Gorman, President of the County of Carleton Law Assoc and Mr. F. H. Chrysler, Q.C., of Ottawa.

The following is the programme of toasts :—

The Queen and the Governor-General, proposed by the chairman.

The Senate and House of Commons, proposed by the chairman, re ed to by Senator Power of Halifax ; B. Russell, Q.C., M.P., of Halifax ; Powell, Q.C., M.P., of Sackville, N.B. ; N. A. Belcourt, M.P., of Ottawa H. J. Logan, M.P., of Amherst, N.S.

The Bench, proposed by Mr. Chrysler and responded to by Judge La of Aylmer, Que., Judge MacTavish of Ottawa and Judge Mosgrove of O

The Canadian Bar Association, proposed by the chairman and resp by Messrs. O. A. Howland, Toronto ; G. F. Gregory, Fredericton ; O'Brien of Toronto ; A. Falconer of Montreal ; and D. A. Mackinn Charlottetown, P.E.I.

The Bar of Ottawa was then proposed by Mr. Falconer and Mr. kinnon, and responded to by Mr. Hogg and Mr. Gorman.

On the return to Ottawa at 6 o'clock from Aylmer of the members Association, an adjourned meeting was held at the Board of Trade Howland in the chair.

Votes of thanks were passed to the Ottawa Board of Trade, and to the of Commons for use of rooms for meetings, and to the Bar of Ottawa fo reception of the Association.

A resolution was also passed that the question of the incorporation Canadian Bar Association be referred to the favorable consideration executive.

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Those of the "briefed" and "briefless" who were able to get away for a holiday, are returning either to work or to wait, as the case may be, glad to have escaped the hottest vacation that has ever been experienced in the province of Ontario, and glad to hear that there are well-founded expectations of brighter business prospects for the future.

Speaking of vacation, the feeling is a growing one that we would do well to spend it in some of the many beautiful and health-giving spots to be found within our own borders, rather than go farther and fare worse. The lakes of northern Ontario are popular with many, and some of us may have crossed the continent westward, whilst others make their annual vacation pilgrimage to the shores of the St. Lawrence. There are few, however, who seem to know the possibilities for recruiting weary brains to be found on the rivers and shores of the Maritime Provinces. Let the disciples of Izaak Walton take their fishing rods to some of the streams of New Brunswick or Nova Scotia, whilst those who want salt water bathing can find none better than is to be had at the many beautiful sea beaches that abound in these provinces, If possible, let them go as far as St. John or Halifax, and see the beauty of their surroundings, and enjoy the best of all sea beaches at Cow Bay. Ours is a country of magnificent distances, and the Atlantic is many miles away, but difficulties arising from this cause are reduced to a minimum by the excellent management and comfortable service of the Canadian Government railway system, and travellers say that the Intercolonial has the smoothest road bed on the continent. It is time, moreover, that we of the long robe knew more of each other in this great Dominion.

BIGAMY AND DIVORCES.

I. BIGAMY UNDER THE CODE.

The bigamy sections of the Criminal Code of C do not prohibit the practice of bigamy as defined i books, namely the crime of having two wives or husbands same time (*a*). The going through the form of a bigamou riage, not the relationship afterwards, is the indictable of Moreover, it is not an offence under the Code for a for resident in Canada to go through the form of a big marriage in another country, even though he may hav Canada with "intent to go through such form of marr Nor is it an offence for a Canadian resident abroad through the form of a bigamous marriage there. Eithe return to Canada with his second choice and take up hi dence next door to his lawful wife and be free from mo tion under our criminal laws (*b*). Several attempts have made in the Courts in the interest of Canadians giv plurality of wives, to narrow still further the effect o bigamy sections. They have sought to have it declare the Dominion Parliament has no jurisdiction over Cana while outside the territory of Canada—in other words th sections in question are ultra vires of the Dominion l ment.

The Canadian law as to bigamy has been prac unchanged, so far as its territorial scope is concerned, sin enactment in 1841. In 1853 its constitutionality was t cessfully attacked in a lower Canadian court in the *McQ case*, 2 L.C.R. 340, and in 1887 the point was raised in O in the *Brierly case*, 14 O.R. 525. The indictment a

(*a*) Sec. 275. Bigamy is the act of a person who, being married, goes the form of marriage with any other person in any part of the world; .

No person shall be liable to be convicted of bigamy in respect of havi through a form of marriage in a place not in Canada, unless such person, British subject resident in Canada, leaves Canada with intent to go throu form of marriage.

(*b*) In *The Queen* v. *Liston* (unreported), tried at the Toronto Assizes Chief Justice Armour held that section 278 of the Code, which is the only which it could be argued covers adultery, was intended to apply only to M

Brierly charged that, being a married man and a British subject resident in Canada, he took to wife another woman at Port Huron, Michigan, having left Canada with intent to commit the offence. Brierly was convicted, subject to a case reserved for the opinion of the High Court as to whether the Dominion Parliament had power to enact the sections in question. The case was argued before the Chancery Divisional Court, and Chancellor Boyd and Mr. Justice Ferguson delivered elaborate judgments, reviewing the statute and the case law, and upheld the constitutionality of the Act. In 1894 the question was raised once more in this Province in the *Plowman case*, 25 O.R. 656, in which the facts were practically identical with those in the Brierly case. The point was argued before the Queen's Bench Divisional Court, and at the conclusion of the argument Chief Justice Armour delivered the judgment of the Court (composd of himself and Mr. Justice Falconbridge) quashing the conviction on the short ground that, "the second marriage is the offence, and the Dominion Parliament has no power to legislate about such an offence in a foreign country." This case stood as the interpretation of the law until the recent judgment of the Supreme Court on the special case referred by the Governor-General-in-Council as to whether the Parliament of Canada had authority to pass sections 275 and 276 of the Code. The Court was divided in opinion, the Chief Justice in a characteristically able, vigorous and elaborate argument, holding with the Queen's Bench Divisional Court that the sections were ultra vires. The other members of the court taking part, namely, Justices Gwynne, Sedgewick, King and Girouard, agreed with the Chancery Divisional Court that the sections were intra vires of Dominion jurisdiction. It should be added that the case was presented to the Court ex parte on behalf of the Department of Justice.

It was conceded by Sir Henry Strong, as by Chief Justice Armour, that the Imperial Parliament may enact regulations governing the conduct of British subjects in foreign countries, and it was also conceded that such power may be dele-

gated by the Imperial Parliament, but Sir Henry thou clear "beyond question" that the power of legislat regards criminal law conferred upon the Dominion Parl is confined to offences committed within the Dominic does not warrrant personal jurisdiction as to matters o of it.

Mr. Justice Gwynne and the other members of the all of whom delivered written opinions, took the na rather than the colonial, view of the status of the Ca Parliament. Mr. Justice Gwynne said: "I confess it a to me that the whole proceedings adopted for the purp framing the constitution of the Dominion must be desi a sham and a farce . . . . . if the Parliament great Dominion, now extending from ocean to ocea embracing within its limits half a continent, and under its sovereign control all matters relating to ma and divorce and criminal law especially, and to the order and good government of Canada generally, sho held not to have jurisdiction to exercise that control terms of sections 275 and 276 of the Criminal Code. ing as Canada does upon several foreign States, in m which the law relating to marriage and divorce are demoralizing and degrading to the marriage state, such lation as is contained in the above sections of the Cr Code seems to be absolutely essential to the peace, ord good government of Canada, and in particular to the tenance within Canada of the purity of the marriage . . If the Courts should hold otherwise they would opinion inflict a deadly stab upon the constitution Dominion." To which the hard and fast legalist might p reply, *Fiat justitia ruat cælum.*

II. AMERICAN DIVORCES IN CANADA.

The language of Mr. Justice Gwynne naturally su an inquiry as to the status of American divorces in C and as to the effect, if any, of the judgment of the Su Court upon the validity here of such divorces. In a ne

way it is, I think, generally assumed that prior to the *Plowman case* American divorces were of little or no validity in Canada; that while the judgment in that case was accepted as an interpretation of the law, such divorces were effective, and that since the judgment of the Supreme Court American divorces have been relegated once more to the limbo of worthless things. In point of fact neither decision made any new declaration, or indeed any declaration whatever of the law on the subject of the status of foreign divorces in Canada. It is true that the Criminal Code (s. 275) makes a divorce a good defence to a prosecution for bigamy, and Plowman had a Chicago divorce. But his divorce was founded upon a sham domicil, and was for that reason rejected as a defence by the trial judge. No further reliance seems to have been placed upon it by his counsel, and no mention of it appears in the report.

For a long time the English courts inclined to the view that the right to divorce, and therefore the validity of a foreign divorce in England, depended upon the law under which the marriage was celebrated, After the Matrimonial Causes Act of 1857, however, by which jurisdiction was given to the civil courts in matrimonial causes, the principle which is now fairly well recognized began to prevail. That principle is that jurisdiction in matters of divorce depends upon the domicil of the parties at the time of the commencement of the divorce proceedings. If, therefore, the parties being domiciled, that is to say having their permanent home, in a foreign country, are divorced there, without collusion or fraud, by a court of competent jurisdiction, such a divorce has in England the same effect as an English divorce, and that quite irrespective of the place of marriage; or of the residence or allegiance of the parties; or of their domicil at the time of the marriage; or of the place in which the offence in respect of which the divorce was granted was committed; or even, it would seem, of the fact that the divorce may have been for a cause not recognized as sufficient in England (*a*). Lord Penzance thus states the policy of the English law:

(*a*) Dicey's Conflict of Laws, pp. 269, 391, 755.

"It is both just and reasonable that the differences of
ried people should be adjusted according to the laws
community to which they belong, and dealt with by t
bunals which alone can administer these laws. An
adhesion moreover to those principles will preclude the
dal which arises when a man and woman are held to be
and wife in one country and strangers in another." (*a*)

Notwithstanding the absence of divorce courts in so
the Provinces, there can be no doubt that the law in a
Provinces as to the validity of foreign divorces is similar t
of England. The Supreme Court at Ottawa settled the
in *Stevens* v. *Fisk*, 8 Leg. News 42; Cassels Dig. 235. I
case, the parties being natives of the United States and
ciled in New York, were married there. Subsequently th
moved to Montreal, where the husband took up his perm
residence. The wife some time afterwards returned to
York to her mother, and instituted proceedings for divo
that state, on the ground of adultery. The husband
served in Montreal, and appeared by attorney, but file
defence, and a divorce was accordingly granted. The
tion of the validity of the divorce in Quebec arose in a
action brought by the former wife against the former hus
for an account. If the divorce was valid the action was
tainable under the laws of Quebec; otherwise it was
The trial judge held that the divorce was binding and
tive. The Court of Queen's Bench, composed of five ju
held by a majority of one that it was not, and that "not
standing such decree, according to the laws of the
Province" the plaintiff was still the wife of the defendan
the Supreme Court Chief Justice Ritchie and Ju
Gwynne and Henry agreed with the trial judge,
Mr. Justice Strong (dissenting) thought the Court of Q
Bench was "perfectly right." Mr. Justice Gwynne bas
opinion, as he did in the later case as to the validity
bigamy sections of the Code, largely upon grounds of
policy, arguing, however, from rather a different po
view. He said:

(*a*) L.R. 2 P & D. 435, 442.

"That upon one side of the line of 45 degrees of latitude the plaintiff and defendant should be held to be unmarried, with all the incidents of their being sole and unmarried, and that upon the other side of the same line they should be held to be man and wife, is a result so inconvenient, injurious and mischievous, and fraught with such confusion and serious consequences, that in my opinion no tribunal not under a peremptory obligation so to hold should do so. Such a decision would, in my opinion, have the effect of doing great violence to that *comitas inter gentes* which should be assiduously cultivated by all neighboring nations, especially by nations whose laws are so similar, and derived from the same fountain of justice and equity, as are those of the State of New York and Canada, and between whom such constant intercourse and such friendly relations exist."

In the synopsis of the second chapter of Mr. Gemmill's book on divorce in Canada appears the phrase "American divorces of no effect in Canada," and in the text itself that phrase is expanded thus: "It has been clearly settled that under no circumstances would Parliament recognize an American divorce as valid and conclusive in Canada." The only authority cited in support of this proposition is the Ash divorce case which came before Parliament in 1887. The parties in that case had been married at Kingston, Ont. Shortly afterwards the wife abandoned the husband because, as she alleged, of his intemperate habits. He went to Massachusetts, where after a residence of several years he procured a divorce, and subsequently married another woman in this province, returning, however, with her to his home in Massachusetts. The first wife then applied at Ottawa for a divorce, upon the only ground recognized there, namely, adultery, alleging that the second marriage was bigamous. There could be no bigamy, and no adultery, and indeed no necessity for a Canadian divorce, if the American divorce was valid in Canada, and as the bill passed Mr. Gemmill appears to have assumed that that fact gave legislative sanction to the view he expresses. It is true that an extreme view was strongly urged in the Senate, and that it was apparently accepted there. In con-

cluding his address in support of the Bill Senator Ab
said: "In my opinion and in the opinion of the Minist
Justice the judgment of divorce in this case is not bin
in this country, and *a fortiori* it cannot be binding in
House."(*a*) But it is manifest that neither the vot
Parliament on this bill, nor the opinions of individual S
tors, nor indeed the opinions of all the representative
both the Senate and the House collectively, assuming
they were all of the opinion of Senator Abbott, could
any binding effect, outside of the Ash case, either upon
future Parliament, or upon any Canadian court of justice.

Under *Stevens* v. *Fisk* and the English authorities,
submitted that an American divorce will be held to be v
in the Canadian courts if (1) the court granting it was a c
of competent jurisdiction; (2) the parties were in good
domiciled in the state in which the divorce was grante
the time when the divorce proceedings were commen
(3) the proceedings were free from fraud and collusion;
it is apprehended that this would be the case even th
the divorce were from the bond of a marriage con
entered into in Canada, and were granted on no better gr
than "incompatibility of temper." Cases in which both
ties were not domiciled at the time of the divorce in
state granting it, present more difficulty, arising partly
the legal fiction that husband and wife are one, and
from the absence of jurisdiction of the courts of one co
over the subjects of another. As to the latter point th
York Court of Appeals recently declared invalid a d
granted in Dakota on the petition of a wife, wher
husband being domiciled in New York was served ther
did not appear, on the ground of want of jurisdiction
Dakota court over a resident of New York (*b*). *A for*
Canadian court would doubtless refuse to recogni
American divorce where the respondent was a British su
resident in Canada, and had not appeared or submitted
jurisdiction of the foreign tribunal. As to domicil

(*a*) Senate Debates, 1887, p. 228.
(*b*) 57 Albany Law Journal (1898) 198.

English courts hold to the view that the domicil of the wife in divorce as in other matters, is the domicil of the husband, and that therefore divorce proceedings must be in the country of the husband's domicil. The American courts on the other hand recognize that for the purpose of instituting divorce proceedings a wife may acquire a separate domicil.

In *Stevens* v. *Fisk* the Supreme Court adopted the ratio decidendi of the American cases, though the judgment on that point may also, perhaps, be justified by the analogy of the English authorities, which appear to recognize, as an exception to the general rule, that, in the case of an English marriage where the husband deserts the wife and goes to a foreign country, the wife may maintain divorce proceedings in England (*a*).

However that may be, it is at least doubtful, in view of a recent decision of the Privy Council (*b*), whether the rule as to a wife's domicil adopted by the American courts would now be followed in this country, to any greater extent, at all events, than was done in *Stevens* v. *Fisk*.

It is hardly necessary to add that our courts, following both English and American precedent, will not recognize a divorce granted by a country in which the parties (or one of them) was not domiciled at the commencement of the divorce proceedings; and, if the divorce be a mere sham devised for the occasion, as in the *Plowman case*, the divorce will certainly be of no validity here, and probably of none anywhere else—even in the state where granted.

W. E. RANEY.

(*a*) Dicey's Conflict of Laws, 275.
(*b*) *Le Messurier* v. *LeMessurier*, (1895) A.C. 517.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

DISCOVERY — PRACTICE — PRIVILEGE — DOCUMENTS IN PREVIOUS ACT SECONDARY EVIDENCE.

In *Calcraft* v. *Guest* (1898) 1 Q.B. 759, the Court of A discuss the alleged conflict between the cases of *Mi Morgan*, L.R. 8 Chy. 361, and *Wheeler* v. *Le Marchant*, 1 D. 675, and hold that rightly understood both cases are sistent with each other. In this case, after the trial c documents connected with a prior litigation in refere the same matter between the plaintiff's predecessor in and third parties were discovered, and the defendant obt copies thereof. The documents belonged to the plaintif were privileged from production. Judgment having given in favour of the plaintiff, the defendant appealed on the appeal claimed to read the copies he had taken c documents in question. For the plaintiff it was argued as the documents were privileged the copies were missible. The Court of Appeal (Lindley, M.R., and R and Williams, L.JJ.) were of opinion that though the lege remained, and that although the plaintiff could n compelled to produce the originals, nevertheless the de ant being in a position to give secondary evidence of contents, was entitled to do so, and that such evidenc admissible.

CHOSE IN ACTION — ASSIGNMENT — MORTGAGE — ABSOLUTE ASSI WITH PROVISO FOR REDEMPTION—ASSIGNMENT OF PART OF DEBT—JUD ACT 1873 (36 & 37 Vict., c. 66), s. 25 s.-s 6—(R.S.O. c. 58 (5), (6),) — I

Durham v. *Robertson* (1898) 1 Q.B., 765 turns upon th struction of the Eng. Jud. Act, s. 25, s.-s. 6 (from which On Act, s. 58 (5) (6) are taken), and which enables the ass of a chose in action claiming under an absolute a ment in writing to sue in his own name for the debt assi The question was whether the assignment relied on was

lute within the meaning of the Act, and not by way of charge only. The assignment was in these words: "Re Building Contract, South Lambeth Road. In consideration of money advanced from time to time we hereby charge the sum of £1,800, which will become due to us from John Robertson on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." Notice of this was given to Robertson. Wills, J., who tried the action gave judgment in favour of the plaintiff. The Court of Appeal (Smith, Chitty and Collins, L.JJ.) however took a different view of the matter, and held that although an absolute assignment by way of mortgage with a proviso for redemption express or implied is within the statute, as was determined in *Tancred* v. *Delagoa Bay* (1889) 23 Q.B.D. 239, yet that the document relied on in the present case was by way of charge, and therefore not within the Act. In arriving at this conclusion Chitty, L.J., takes occasion to disapprove of the decision in *Brice* v. *Bannister*, 3 Q.B.D. 569. He also expresses a doubt whether an absolute assignment of part of a debt would be within the statute, but on this point neither Smith nor Collins, L.JJ. express any opinion. The defect in the plaintiff's proceedings it was also held could not, after trial, be cured by the addition of the assignors as parties.

COUNTER CLAIM—CAUSE OF ACTION AGAINST PLAINTIFF BY DEFENDANT JOINTLY WITH ANOTHER PERSON—JOINDER OF PARTIES—ORD. XVI., R. 11, ORD. XXI., R. 11—(ONT. RULES 206, 248).

Pender v. *Taddei* (1898) 1 Q.B. 798, shows that there are limits to the right of pleading a counter claim. In this case the defendant set up a counter claim by himself and another person jointly, against the plaintiff; and he added the other person as a party defendant to the counter claim, but the Court of Appeal (Smith, Chitty, and Collins, L.JJ.) were unanimous that the Rules do not admit of such a counter claim being set up, and affirmed the order of the Judge at Chambers striking it out. Ord. xxi., r. 11 (Ont. Rule 248) was held not to authorize the adding as a defendant a party jointly interested with the defendant pleading the counter claim.

MANDAMUS—JUSTICES—HEARING AND DETERMINATION ACCORDING
—STATUTORY JURISDICTION.

In *The Queen* v. *Cotham* (1898) 1 Q.B. 802, a mand
was granted to justices to hear and determine a matter a
ing to law. The matter in question was an application
license, which the justices had statutory power to gra
certain circumstances. The justices had entertaine
application, and had granted it without regard to the
sions of the statute, and inasmuch as it was obvious
they had acted upon some considerations altogether ou
the statute, it was held that they had not heard and
mined the matter according to law, and that a mandam
compel them so to hear and determine it ought to go.

MALICIOUS INJURY—ADDING WATER TO MILK—FRAUDULENT MO
ABSENCE OF MALICE—24 & 25 VICT. C. 97, S. 52—(CR. CODE, S. 511).

Roper v. *Knott* (1898) 1 Q.B. 868, this was a case state
a magistrate. The defendant was charged with mali
injury to the plaintiff's property. The defendant was a
carrier in the plaintiff's employment, and the alleged of
consisted in adding water to the milk delivered to hi
carriage to the plaintiff's customers. The addition was
as alleged, to protect the defendant from loss by accid
spilling of the milk. No milk was delivered on the mo
when the addition was made, but the whole of the mil
spoiled and thrown away, and the loss occasioned thereb
10s. 8d. The magistrate found that the addition was mad
the purpose of enabling the defendant to make a profi
himself by selling the surplus milk and not accounting
but that there was no intention to injure the plaintiff, b
felt bound by the decision in *Hall* v. *Richardson*, 54 J. P.
to acquit the defendant. The Court for Crown Cases res
(Lord Russell, C.J., and Day, Wills, Grantham, Wright
Kennedy, JJ.), were agreed that *Hall* v. *Richardson* wa
good law, and remitted the case to the magistrate to co
the defendant. This case would seem to be an auth
for interpretation of the Cr. Code s. 571 in a similar case

CRIMINAL LAW—BETTING—PLACE USED FOR BETTING—ARCHWAY ON STREET—BETTING ACT (16 & 17 VICT. C. 119) SS. 1, 3—(CR. CODE SS. 197, 198).

In *The Queen* v. *Humphrey* (1898) 1 Q.B. 875, the question to be determined was whether an archway which was a private thoroughfare leading from a public street into a yard containing dwelling houses, stables and workshops, which the prisoner was accustomed to resort to for the purpose of betting with persons who came to him there, was a "place" within the meaning of the Betting Act, 1853 (16 & 17 Vict. c. 119) ss. 1, 3, (Cr. Code, ss. 197, 198). The Court for Crown Cases reserved (Lord Russell, C.J., Hawkins, Wills, Kennedy and Ridley, JJ.), held that it was. The case is noteworthy for the observations made on the case of *Powell* v. *Kempton Park* (1897) 2 Q.B. 242 (see ante vol. 33, p. 762), which is said to have been a collusive action brought to get rid of the effect of the decision in *Hawke* v. *Dunn* (1897) 1 Q B. 579, (see ante vol. 33, p. 578). Lord Russell, C.J., seems to intimate that the decision of the Court of Appeal in *Powell* v. *Kempton Park*, would not be binding on the Court for Crown Cases reserved, although entitled to be treated with deference and respect. The judges are agreed, however, on the desirability of further legislation to get over the difficulty created by the difference of judicial opinion as to what is and what is not "a place" within the meaning of the Act.

MASTER AND SERVANT—FACTORY ACT. 1878 (41 & 42 VICT. C. 16), SS. 17, 83, 94. (R.S.O C. 256, SS. 6, 9, 14)—EMPLOYMENT OF YOUNG PERSON DURING PROHIBITED HOURS WORKING FOR AMUSEMENT.

In *Prior* v. *Slaithwaite S. Co.* (1898) 1 Q.B. 881, the defendants were charged with a breach of the Factory Act, 1878 (41 & 42 Vict., c. 16), (see R.S.O. c. 256, ss. 6, 9, 14) for permitting a young person in their employment to work during the time allowed for a meal. The evidence showed that the young person, contrary to his orders, and for his own amusement, had oiled part of the machinery during the hour allowed for a meal. The Court (Wills and Kennedy, JJ.) held that this was an employment within prohibited hours within the statute, and that the defendant company was liable for the statutory penalty.

ADMINISTRATION—PRESUMPTION OF DEATH—DISAPPEARANCE FOR 7 YEARS

In the goods of Winston (1898) P. 143. This was an application for letters of administration to the estate of a man who had been last heard of in July, 1891. The application was made before the lapse of seven years for the purpose of proving a claim in a Chancery suit. The application was granted, but it was directed that the grant should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of the seven years.

INJUNCTION—COMPANY—SIMILARITY OF NAME—DECEPTION.

Manchester Brewery Co. v. *North Cheshire and Manchester Brewery Co.* (1898) 1 Ch. 539. This was an action to restrain the defendants from using the name "North Cheshire and Manchester Brewery Co." In 1897 two companies existed called the "Manchester Brewery Co." and "the North Cheshire Brewery Co." The former had its brewery in Manchester and had a large business there. The latter had its brewery in Macclesfield, and had business there and also in Manchester. In that year the latter company's business was sold to persons who started a new company called the "North Cheshire and Manchester Brewery Co." There was no evidence of any fraudulent intent on the part of the defendants, and Bryne, J., who tried the action, thought no sufficient ground was shown for the interference of the Court. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) were of a different opinion and considered there was a sufficient similarity of name between the plaintiff company's and that adopted by the defendant, as to be likely to deceive the public into a belief that there had been an amalgamation of the two companies, and an injunction was granted.

Correspondence.

EXEMPTIONS FROM DISTRESS.

To the Editor of the Canada Law Journal:

Sir,—I observe in your valuable periodical two recent decisions, *Harris* v. *Can. Perm. L. & S. Co.*, 34 C.L.J. 39, and *Shannon* v. *O'Brien*, *ib.* 421, bearing upon the exemption sec-

tion of the Landlord and Tenant Act, and your observations upon them in your July issue. I also venture to think these judgments are somewhat open to question, though given by judges whose decisions are entitled to much weight. There cannot be any question but that the legislation referred to, s-s. 2 of s. 30 R.S.O. (1897) c. 170, is vague and of difficult construction, but if that alone would enable our judges to ignore a statute, we should have a considerable portion of our legislation disregarded. Judge Snider states in his judgment in the latter case, "I recognize that it is my duty to give effect to the intention of the legislature, if I can discover it," and it is in that view, not as defending vague legislation of this kind, that I venture to think the meaning of this sub-section can be found. Without going into a lengthy or elaborate argument, I would say that I have had to advise more than once on the sub-section referred to, and while recognizing the difficulty of construction, I have given the opinion that under the statute, the landlord's bailiff when more than two months' rent was in arrear, could seize and sell sufficient of the exempted goods to settle the amount of rent that accrued after the two months' rent fell due, that is for the third and subsequent months, and should the tenant before sale pay or tender the rent other than for such first two months the bailiff would have to withdraw from possession, in other words that, so far as such exempted goods are concerned, the first two months' arrears of rent could be considered only as giving the right to seize for the rent that subsequently thereto accrued due, and except as to the giving of such right said two months rent would virtually have to be considered as non-existent.

It appears to me that this interpretation overcomes many of the difficulties suggested by the learned judges, and gives a reasonable interpretation to this certainly somewhat obscure enactment. I might add that the sub-section referred to was probably enacted to enable monthly tenants with small means and few chattels to obtain leniency from their landlords during the winter months when work is difficult to be had, a landlord being often willing to risk the loss of two months' rent when he would not be prepared to lose more.

Barrie. SUBSCRIBER.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] CUMMINGS *v.* TAYLOR. [May 6.

Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.

Where an assignment has been held void as against the statute 13 Elizabeth, c. 5, and the result of such decision is that a creditor who had subsevuently obtained judgment against the assignor, and notwithstanding the assignment, sold all the debtor's personal property so transferred under execution issued upon the said judgment, was entitled to all the personal property of the assignor so levied upon by him under his execution, such creditor has no legal right or equity to an account, or to follow moneys received by the assignee or paid by him, under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible. Appeal allowed with costs.

Lovett, for the appellants. *McNeil*, for the respondents.

Ontario] JORDAN *v.* PROVINCIAL PROVIDENT INSTITUTION. [June 14.

Life Insurance—Application—Representation—Warranties—55 Vict., c. 39 s. 33 (2) (3) (Ont.)

The provisions of sub-section two of section 33 of "The Insurance Corporations Act, 1892" (Ont.), requiring any condition or warranty endorsed on the policy providing that the contract of insurance should be avoided by reason of statements in the application, to be limited to cases in which such statements may be material to the contract, do not require the materiality of the statement to appear on the endorsement, but the contract will only be avoided thereby if such statement is subsequently judicially found to be material under the following sub-section. A misrepresentation in such a statement if so found to be material will avoid the policy notwithstanding that it was made in good faith and in the conscientious belief that it was true. Appeal dismissed with costs.

Reeve, Q.C., and *Day* for appellant. *Osler*, Q.C., and *MacMurchy*, for respondent.

Ontario.] ANDERSON *v.* GRAND TRUNK RAILWAY. [June 14.

Railway—Use of railway premises—Invitation—Trespass—Negligence.

At a place called Lucan Crossing, on the line of the Grand Trunk railway, passengers are received and allowed off, tickets being sold to and from such place. There is no depot, but a small building, part of which is used for a

waiting room, and no right of way to the public highway is provided, passengers being obliged to cross the railway tracks. M., on returning from London, to a place about three miles from Lucan, found he could only get to the latter place, owing to a violent snowstorm, and arriving there started to walk to his home, but in going along the track to reach the highway he was struck by a train and killed. In an action by his administrators for damages

Held, that notwithstanding the usage for many years of the tracks by passengers for egress from the train, M. could not be said to be on the track by invitation or license of the company, and the action would not lie. Appeal allowed with costs.

Osler, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

Nova Scotia.] MULCAHEY *v.* ARCHIBALD. [June 14.

Debtor and creditor—Transfer of property—Delaying or defeating creditors—13 Eliz., c. 5.

A transfer of property to a creditor for valuable consideration, to prevent its being seized under execution at the suit of another creditor, and with intent to delay the latter in his remedies, or defeat them altogether, is not void under 13 Eliz., c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. Appeal allowed with costs.

Harris, Q.C.. for appellants. *McInnes*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] MCMILLAN *v.* MUNRO. [May 10.

Registry law—Priorities—Mortgage for balance of purchase money.

The plaintiff agreed to sell a parcel of land, one half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made and the deed delivered to the purchaser. The mortgage was delivered to the vendor's agent to be registered. The purchaser had obtained the cash payment from the defendant upon the security of a first mortgage upon the land in question, and this mortgage was prepared, executed and delivered before the execution and delivery of the deed, and was registered before the deed and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith, and each without knowledge or notice of the other's mortgage.

Held, that the Registry Act did not apply; that the defendant's mortgage

was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the claim of the plaintiff for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority. *Nevitt* v. *McMurray* (1886), 14 A R. 126, applied.

Judgment of ROSE, J., reversed.

E. H. Tiffany, for appellant. *A. C. Macdonell*, for respondent.

From Rose, J.] WILSON *v.* LYMAN. [May 10.

Trade mark—Trade name—"Fly poison pad."

The plaintiffs sold sheets of paper, saturated with fly poison, under the name of "Wilson's Fly Poison Pad." These words were registered by them as a trade mark, and were printed on each sheet, and the sheets became known in the trade as "pads."

Held, that the word "pads" was *publici juris*, and that the defendants, who were manufacturers and vendors of fly poison, were entitled to describe as "pads" sheets of paper used by them for a similar purpose, the general appearance of the sheets being different, and their name appearing prominently on them.

Judgment of ROSE, J., affirmed.

S. H. Blake, Q.C., and *J. J. Scott*, for appellants. *D. E. Thomson*, Q.C., and *D. Henderson*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C.] [April 12.

CANADA PERMANENT LOAN & SAVINGS CO. *v.* TRADERS BANK.

Fixtures—Plant and machinery—Included in mortgage—Agreement for security—Subsequent mortgage—Chattel mortgage—Constructively affixed—Notice.

The plaintiffs were mortgagees from a manufacturing company, and their mortgage in addition to the land and premises included "all the plant and machinery now upon or hereafter placed upon said land, all of which plant and machinery are to be considered as fixtures for the purpose of this mortgage," and provided "that none of the machinery . . . will be removed during the currency of this mortgage," and after the covenant to insure "the foregoing covenant to insure shall apply to machinery as well as to buildings and the company (plaintiffs) shall have a first lien" etc., and was duly registered. The defendants were assignees of a subsequent mortgage which included the plant and machinery in similar terms, but subject to plaintiff's mortgage, and were also mortgagees under a chattel mortgage, covering "all the machinery and plant on the said premises" and most of the machines, etc. In an action for a declaration that the plaintiffs had a lien on certain machines, and for an injunction to restrain the defendants from removing them

Held, that all the chattels of the nature of plant or machinery put upon the premises were constructively converted into fixtures for the purposes of security; that the things not structurally affixed were constructively affixed, and the onus of proving that was discharged by proving the agreement in the mortgage that the second mortgage having been made subject to the first the presumption of law is that there was notice of the prior one which continued when the chattel mortgage was taken, and that the defendants were in no better position than the mortgagor company, and as the latter could not remove themt, he defendants holding with notice were equally bound.

S. H. Blake, Q.C., and *C. J. Leonard*, for plaintiffs. *James Parks*, for defendants.

Rose, J.] O'NEIL *v.* HOBBS. [May 21.

Division Courts—Tort—Payment of money into Court.

In a Division Court action for a tort, money paid into Court by a defendant in alleged satisfaction of the plaintiff's claim at once becomes the plaintiff's, but when he proceeds with the action it must, under Rule 170, remain in Court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom.

Where, therefore, after payment into Court by a defendant of a sum of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favor, an order made by the Division Court Judge directing the sum so paid in to be paid out to the defendant was set aside, and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant.

Talbot Macbeth, for motion. *Toothe*, contra.

Street, J.] [June 4.

CORNWALL WATERWORKS CO. *v.* CORPORATION OF CORNWALL.

Waterworks—Municipal corporations—R.S.O. c. 199—Award fixing amount to be paid for property—Passing of by-law to raise amount—Right of corporation to take possession—Agent of corporation—Mortgagees.

Upon the making of an award fixing the amount to be paid for waterworks in an arbitration under R.S.O. c. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the said amount, the corporation is entitled under section 62, to the possession of the property, and therefore no action would lie against the corporation to recover the possession so required, nor would an action lie against an agent of the corporation duly appointed to procure possession.

The six months provided for by section 64 within which the amount must be paid, otherwise the waterworks company may resume possession, must have elapsed before action brought to recover possession, is not sufficient that the said time should have elapsed at the time the action was tried.

Mortgagees of the waterworks company, who were not parties to the arbitration, or referred to in the award, and who have taken no part in the taking of possession, were not necessary parties to the action

D. B. Maclennan, Q.C., for the plaintiffs. *Leitch*, Q.C., for the corporation and their agent. *A. Bruce*, Q.C., for the mortgagees.

Rose, J.] SLATTERY *v.* DUN. [June 16.

Security for costs—Libel—Newspaper—Commercial Agency Sheet—R.S.O. c. 68, s. 1.

A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "newspaper," and "printed for sale," within the meaning of s. 1 of R S.O., c. 68; and the publishers are, therefore, in an action for libel brought against them, entitled to the benefit of the provisions as to security for costs contained in s. 10.

W. H. P. Clement, for plaintiffs. *Wallace Nesbitt*, for defendants.

Ferguson, J.] RE LEWIS. [June 21.

Intestacy—Release by son of intestate—Claim by next of kin of son—Advancement.

A son in consideration of his father conveying to him certain land, accepted it as an advancement, in lieu of and in full of all claims and demands against his father's estate, either for wages, or as one of his no-heirs or next of kin, and agreed that he would neither make any claim against the estate, nor attempt to set aside or invalidate any will or conveyance made by the father. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as co-heirs or next of kin of their grandfather, to share in the estate.

Held, that the children's claim could not be maintained, for they took, if at all, per stirpes, i.e., as representatives of their father, and as their father was precluded by the agreement he had entered into from taking anything, so were the children.

Alfred Hoskin, Q.C., for adult daughters of intestacy. *A. E. Hoskin*, for administrators. *W. Macdonald*, for the sons of adult children. *A. T. Boyd*, for son's infant children.

Meredith, J.] TYTLER *v.* CANADIAN PACIFIC RAILWAY CO. [June 29.

Jurisdiction—Cause of action—Service of writ—Railway.

A writ of summons in an action to recover damages against a railway company for an accident which happened in British Columbia, was issued out of the High Court of Justice for Ontario, and was served on the defendants' claims agent in Toronto, in said Province. The head office of the railway was in the Province of Quebec, but the company carried on business in Ontario, where there were many hundred miles of its railway, and millions of its capital invested, and where hundreds of its officers and servants resided.

Held, that the action was properly brought in Ontario, and the service of the writ therein was valid.

Tytler, for the plaintiff. *Robinson*, Q.C., and *Aylesworth*, Q.C., for the defendants.

Ferguson, J.] ATKINSON *v.* CITY OF CHATHAM. [July 16.

Municipal corporations—Highway—Obstruction—Telephone pole—Non-repair—Runaway horses—Liability Notice—Contributory negligence—Indemnity—Telephone Company—Erection of poles—Sanction of corporation—Damages.

A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole planted twelve feet from the centre line, and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants.

Held, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was out of repair, and not in good or reasonable repair ; and the city corporation, having notice and knowledge of the obstruction, and also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained. *Sherwood* v. *City of Hamilton*, 37 U.C.R. 410, followed. *Foley* v. *Township of East Flamborough*, 29 O.R. 139, distinguished.

Driving a horse that has before run away, as one of a pair of horses, is not of itself negligence contributing to the disaster.

Held, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation, and with their sanction, and they could not recover indemnity from the telephone company by whom it was erected. Quantum of plaintiffs' damages considered.

Atkinson, Q.C., and *C. R. Atkinson*, for plaintiffs. *Douglas*, Q.C., and *Aylesworth*, Q.C., for defendants. *M. Wilson*, Q.C., for the telephone company, third parties.

Falconbridge, J., Street, J.] IN RE MATHIEU. [July 20.

Parent and child—Custody of infant—Rights of father—Discretion of Court.

Where a husband has done no wrong, and is able and willing to support his wife and child, the court will not take away from him the custody of his infant child, merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the court over the custody of infants, by R.S.O. c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.

In re Agar Ellis, 10 Ch. D. 71, and *In re Newton* (1896), 1 Ch. 740, specially referred to.

And where a wife, without any other reason than that she was tired of living in the country to which her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times.

F. C. Cooke, for the father. *A. D. Crooks*, for the mother.

Falconbridge, J., Street J.] JUSTIN *v.* GOODISON. [July 25.

Surrogate Court—Removal of cause into High Court—Appeal from an order made before removal.

Immediately upon the making of an order removing a cause or matter from a Surrogate Court into the High Court, under s. 34 of the Surrogate Courts Act, R.S.O. c. 59, such cause or matter becomes an action in the High Court, and ceases to be a cause or matter in the Surrogate Court; and therefore an appeal under s. 36 of the Act from an order made in the Surrogate Court before the removal, cannot be entertained if launched after the removal. The practice to be followed is the practice prescribed in High Court proceedings. *Harris* v. *Judge* (1892) 2 Q.B. 565, *Duke* v. *Davis*, (1893) 2 Q.B. 107, and *Doll* v. *Howard*, 11 Man. L.R. 21, followed.

Justin, for plaintiffs. *R. U. Macpherson*, for defendant.

Falconbridge, J., Street, J.] DONALDSON *v.* WHERRY. [July 30.

County Court—Order in term—Reversal of verdict—Jurisdiction—Rule 615—Appeal to High Court—R.S.O. c. 55, s. 51—Landlord and tenant—Co-tenants—Release of one—Agreement—Consideration—Principal and surety Discharge of principal—Effect on surety—Reservation of remedies.

In a County Court action tried with a jury a verdict was found for the defendant, and judgment in his favour ordered by the trial judge. Upon motion by the plaintiff to set aside the verdict and judgment, and to enter judgment for the plaintiff or for a new trial, the County Court, in term., made an order setting aside the verdict and judgment, and ordered judgment to be entered for the plaintiff.

Held, that, under the provisions of s. 51 of the County Courts Act, R.S.O. c. 55, an appeal by the defendant from the order of the County Court in term, lay to a Divisional Court of the High Court.

In order to put an end to a sealed contract for a tenancy, and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge.

A discharge of the debtor by his creditor, with a reservation of remedies against the debtor's surety, operates merely as a covenant not to sue, and does not operate as a release of the surety.

The County Court Judge, in term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute.

W. C. McKay, for the plaintiff. *Mulvey*, for the defendant Wherry.

Falconbridge, J., Street, J.] IN RE SOLICITORS. [August 3.

Solicitor—Retainer—Joint or several—Severance of defence—Apportionment of costs.

Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the court will look into the facts of the case to discover the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors to the solicitor to whom it was given, but it may be taken distributively. And, upon the facts of this case, the client whom the solicitor sought to charge with the whole costs of the defence to an action conducted up to a certain stage jointly on behalf of this client and another, two of the defendants in the action, and afterwards on behalf of this client alone and by a new solicitor on behalf of the other, was held liable for only one half of the joint costs during the time that the two clients were represented by the same solicitor, but thereafter for the whole of the costs reasonably and properly incurred by such solicitor.

Aylesworth, Q.C., for the solicitors. *J. E. Jones*, for Jane S. Fletcher.

Falconbridge, J., Street, J.] CROSS *v.* CLEARY. [August 5.

Contract—Specific performance—Agreement to bequeath estate—Remuneration for maintenance—Implied promise—Annual payments—Arrears—Statute of Limitations.

The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons.

Held, that, apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or anyone else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it.

Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears.

W. R. Riddell, for the plaintiff. *Aylesworth*, Q.C., for the defendants.

Falconbridge, J., Street, J. } IN RE RENFREW ESTATE. [August 22.

Revenue — Succession duty — Liability of estate for — Property in another Province—Testator domiciled in another Province—Surrogate Courts—Jurisdiction.

The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate, of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal.

Where a deceased person has his domicile, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his whole estate, including property in the Province of his domicile, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty.

Judgment of Judge of Surrogate Court of York affirmed. For full report of this case in the Court below, see ante p. 318.

Aylesworth, Q.C., for the Treasurer of Ontario. *D. T. Symons*, for the executors.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] GATES *v.* LOHNES. [May 23.

Slander—Words imputing commission of unnatural offence—Innuendo—Not necessary to prove where meaning of words obvious—Words not actionable per se—Evidence of hostile witness.

In an action of slander the words complained of accused plaintiff of the commission of an unnatural offence.

Held, (1) It was not necessary to give evidence to prove the innuendo, the meaning of the words being perfectly obvious and unmistakable. (2) Words which without knowledge on the part of those who heard them of the matter to which they referred, could convey no defamatory meaning were not actionable *per se*. (3) Evidence was properly received to show such knowledge. (4) There was no authority for excluding as discredited the whole of the evidence of a witness, who was ruled to be hostile, on the ground that the evidence showed that she had previously made a statement inconsistent with part of her testimony on the trial.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] ORWITZ *v.* MCKAY. [May 23.

Trespass to person—Causing arrest under capias—Malice negatived—Sufficiency of affidavit—Matter for magistrate—Evidence required—Form of writ—Effect of adjudication by magistrate—Party causing arrest not liable though writ set aside—Directions to jury—Discretion of Judge.

The plaintiff H. O. was arrested under a capias issued in a suit brought against him by defendant under the name of C. O. for goods sold and delivered. After his arrest plaintiff took the objection that the capias being against C. O. he could not be dealt with under it, and the magistrate before whom he was brought thereupon dismissed the proceeding. In an action by plaintiff for false arrest the evidence showed that plaintiff rendered his account to plaintiff under the name of C.O., and that while plaintiff objected to certain charges, and requested time for payment, he made no objection to the manner in which the account was made out.

Held, that the jury were justified under the circumstances in negativing malice on the part of defendant.

The affidavit upon which the capias issued showed that plaintiff had been absent from his place of business for some weeks, and was said to have been in the United States, and that the person from whom he purchased his stock was in possession during his absence, and was still so, apparently, at the time the affidavit was made.

Held, (1) These facts would indicate to the magistrate that the business of plaintiff was at an end, and that there was nothing to detain him in the county. (2) Much less evidence would be required to authorize the issue of a capias by a justice of the peace, than would be required to authorize the issue of such a writ in this court. (3) The sufficiency of the grounds set forth in the affidavit was a matter for the magistrate.

The capias being correct in point of form, and the magistrate having jurisdiction over the subject matter, and the defect if any being at most one which would render the writ voidable,

Held, (1) It was competent to defendant to rely upon the adjudication of the magistrate as an answer to the plaintiff's claim of trespass. (2) If the capias was issued through an error of the magistrate the person who directed its issue would not be liable even though the capias were set aside.

The facts as to malice were left to the jury, who were told that absence of reasonable and probable cause was evidence of malice, but they were not directed as to whether in the opinion of the trial judge there was or was not reasonable and probable cause. The judge having submitted to the jury with proper directions all the facts upon which the question of reasonable and probable cause depended, and having determined upon their findings that there was reasonable and probable cause,

Held, that it was in the discretion of the judge to determine the best method of dealing with that aspect of the case, and that plaintiff had suffered no prejudice from the course pursued.

F. B. Wade, Q.C., and *V. Paton*, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] PALGRAVE *v.* MCMILLAN. [May 23.

Costs—Retaxation before Judge—Appeal from—Discretion of Judge—Wrong principle—O. 63 R. 23—Act of 1885, c. 36.

Costs taxed before the Taxing Master were retaxed before a Judge of the Court after notice in writing pursuant to the provisions of O. 63 R. 23 (Acts of 1893, Appendix).

Held, (1) The right of appeal was retained by the Act creating the office of Taxing Master, Acts of 1885, c. 36. (2) The Court would not interfere with the retaxation unless some very gross error had been committed, violating well settled principles of taxation of costs. (3) On retaxation, the judge under the provisions of the rule, had the fullest discretion as to items or parts of items, and having acted within his powers, and it not being shown that the retaxation proceeded upon any wrong principle, that the appeal must be dismissed with costs.

It was brought to the notice of the court that the Taxing Master limited the costs of retaxation to his own fees, and refused the costs of the application before the Judge.

Held, That he erred in doing so, the party succeeding being entitled to all necessary costs incurred in obtaining the result arrived at.

T. J. Wallace, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] RHODENHIZER *v.* BOLLIVER. [May 23.

Parent and child—Gift to daughter living at home—Evidence—Transmutation of possession.

Held, affirming the judgment of the County Court Judge, and dismissing defendant's appeal with costs, that evidence that a cow was said to belong to plaintiff's daughter, while the daughter was living at home, was not sufficient to support an alleged gift in the absence of evidence of any point of time when it could be said that there was a gift, or of any transmutation of possession.

F. B. Wade, Q.C., for appellant. *J. A. McLean*, Q.C., contra.

Full Court.] [May 23.

NORTH SYDNEY MINING AND TRANSPORTATION CO. *v.* GREENER.

Receiver—Application for appointment of, by way of equitable execution—Recorded judgment—Will bind interest of mortgage in land—Sale of interest under execution—R.S., 5th series, c. 84, s. 21, s. 7 (i); R.S., 5th series, c. 124.

The plaintiff company having recovered several judgments against defendant, upon which executions had been issued, which remained unsatisfied, made application to a judge at Chambers for the appointment of a receiver to receive the rents, interest and profits to which defendant might become entitled by virtue of a mortgage upon the lands of L., the mortgage not being yet due.

Held, affirming the judgment of the Chambers Judge refusing the application and dismissing plaintiff's appeal with costs, that the Court should not

appoint a receiver by way of equitable execution, merely because it would be a more convenient way of obtaining satisfaction of the judgment than the ordinary modes of execution.

Held, that the legal title to the land being in defendant, the judgments, when recorded, would clearly bind such interest. (R.S., 5th series, c. 84, s. 7 (*i*) and s. 21).

Held also, that there was nothing to prevent the sale of such interest under execution in accordance with the provisions of R.S., 5th series, c. 124, in the same way as any other interest of a judgment debtor in real estate.

Henry, for appellant. *Mellish*, for respondent.

Full Court.] PALGRAVE *v.* MCMILLAN. [May 23.

Motion to vary order for judgment refused—Laches.

On motion to vary the order for judgment made upon the trial of the cause, so as to award to plaintiffs the costs of certain issues raised upon the counterclaim, it appeared that there was an appeal which was disposed of some years previously, and that the decision now sought was not asked for upon the determination of the appealor, that the trial judge was asked to make the order in the form desired, or to deal specially with the costs upon the issues, which appeared to have been considered unimportant. It could not be said that the omission to obtain the order in the form desired, either from the trial judge, or upon appeal, was a "mere slip."

Held, that even if the Court had the power to grant the relief sought, they should not exercise it under the circumstances, and after the long delay that had taken place.

T. J. Wallace, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] SCHNARE *v.* ZWICKER. [May 23.

Breach of covenant for quiet possession—Counterclaim for rectification—Evidence—Rectification ordered—Covenant not to be implied where deed contains express warranty on same subject—Quære, whether action will be on warranty in freehold—Conveyance where freehold is called in question—Evidence as to breach held insufficient.

Plaintiff claimed damages for breach of covenant for quiet possession and warranty in relation to several lots of land alleged to be contained in a deed from defendant to plaintiff. Defendant counterclaimed to have the deed rectified on the ground that the intention of the parties was to convey the interest of defendant alone in the land in question. The evidence showed that at the time the deed was given defendant was the owner of four undivided sixths of the land, the remaining two-sixths being owned by E. S. and L. S. respectively; also that after the making of the deed by defendant, plaintiff purchased from E. S. her one-sixth interest and endeavoured to purchase the one-sixth interest owned by L. S. The interest of L. S. was conveyed to A., who commenced an action for partition, which was the breach of warranty relied upon.

Held, that as the deed did not carry out the real intention of the parties, the trial judge was right in directing it to be rectified so as to convey the interest of the defendant alone in the lots described.

Held also, that as the deed contained an express warranty, no other covenant on the same subject could be implied.

Quaere, Whether an action for breach of covenant would lie on a warranty where the warranty is in a freehold conveyance, and the freehold is called in question.

Held also, that assuming an action would lie in this case for breach of covenant for quiet possession, or warranty, no sufficient breach had been proved, the alleged disturbance of possession not having been made by defendant, or any one claiming under him.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] MARSHALL *v.* MATHESON. [May 23.

Counterclaim—Evidence to support judgment for defendant upon—Costs.

In an action by plaintiff against defendant on a promissory note, the latter counterclaimed for damages on account of the failure of plaintiff to deliver goods according to contract, by which defendant was prevented from making sales and lost commissions, etc. The evidence given in support of the claim went to show that some parties refused to take goods on account of delay in the delivery of them, but it was not shown how many persons so refused, or what quantity of goods they refused to take, or the dates or times at which the alleged refusals were made.

Held, that the evidence was insufficient to support the judgment in defendant's favor on the counterclaim, and that the appeal as to the counterclaim must be allowed with costs, but as plaintiff appeared to have been somewhat in fault, that the counterclaim should be set aside without costs.

J. A. Chisholm, for appellant. *H. McInnes*, for respondent.

Full Court.] GUILD *v.* DODD. [May 23.

Action for conversion—Question for trial judge—Costs.

In an action brought by plaintiff against defendant to recover damages for the conversion of a quantity of hay, plaintiff's right to recover depended upon whether the hay in question was "upland" or "intervale."

Held, dismissing plaintiff's appeal with costs, that the question was peculiarly one for the trial judge, the evidence being contradictory, and the question being one that the judge has exceptional advantages for determining.

F. A. Laurence, Q.C., for appellant. *H. A. Lovett*, for respondent.

Full Court.] FEINDEL *v.* ZWICKER. [May 23.

Trespass—Counterclaim for rectification of deed—False and fraudulent representations as to boundary of land bargained for—Remedy against vendor.

Plaintiff agreed to sell to defendant a lot of land extending up the river as far as the line of property of G., which line was represented as being marked

by a pine tree. In an action of trespass brought by plaintiff against defendant for piling logs on a portion of the land bargained for, it appeared that the boundary of G.'s property was not marked by the pine tree, but that the tree fell several rods short of it, and that the title to the land between the tree and the line of G.'s property, and in respect of which the action was brought, remained in plaintiff. The evidence showed that defendant was induced to complete the purchase by the false and fraudulent representations of plaintiff that the whole lot was being conveyed up to G.'s line, plaintiff intending at the time to reserve for his own use the portion of the lot intervening between the tree and G.'s line.

Held, HENRY, J., dissenting, that defendant was not entitled under these circumstances to have his deed rectified on the ground of mutual mistake, but that his only remedy was against plaintiff for the fraud.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] CRAVEN *v.* WILLIAMSON. [May 23.

Breach of promise of marriage—Order for arrest of defendant under O. 44, R. 1—Affidavit for.

In an action for breach of promise of marriage an order for the arrest of defendant was obtained from a commissioner under O. 44, R. 1, which authorizes the making of such an order upon proof, to the satisfaction of the commissioner, that the plaintiff has a good cause of action. The order was obtained on an affidavit of plaintiff's father, stating that plaintiff had a good cause of action, but not giving the date of the contract, or showing that a time was fixed when the marriage was to take place, and that such time had elapsed, or that it was to take place within a reasonable time, and that such time had expired. No material was placed before the commissioner upon which he could exercise his judgment in determining for himself that there was a contract and a breach.

Held, affirming the judgment of MEAGHER, J., discharging the order for arrest, that the affidavit was insufficient, and not in conformity with the requirements of the order regulating the practice. *Dewolf* v. *Vineo*, 1 N. S. R. 26, questioned.

Henry, for appellant. *Rowlings*, for respondent.

Full Court.] HICKMAN *v.* BAKER. [May 23.

Money had and received—Evidence—Change of position—Application for leave to adduce further evidence.

Plaintiff shipped a quantity of fish by the schooner "Gleaner," of which J. was master, with the understanding that the fish was to be sold by J., and the balance, after deducting freight and expenses, remitted to plaintiff. The fish was sold by J. and the defendant B., and at the request of J. the money was paid over to B., who sought to retain it in satisfaction of an amount due him by J. The evidence showed that B. was twice informed by J. that he had the fish on freight, and he had means of ascertaining, by the exercise of due

diligence, that the fish was the property of plaintiff. It appearing that nothing had occurred to induce B. to change his position in any way to his prejudice, and that he sought to retain the money and apply it in satisfaction of the debt due by J., without having received any authority therefor from anyone,

Held, that the judge of the County Court was right in finding in plaintiff's favor, and that defendant's appeal should be dismissed with costs.

Held, further, that defendant's application for leave to adduce further evidence must be refused with costs, the rule which permits that to be done upon appeal being limited to cases originating in the Supreme Court.

W. B. A. Ritchie, Q.C , for appellant. *Rowlings*, for respondent.

Full Court.] ATTORNEY-GENERAL *v.* PARKER. May 23.

Succession Duty Act—Acts of 1895, c. 8, s. 5 and 7—Does not apply to funa transferred by power of appointment exercised after passage of Act where testator died previously.

By the Succession Duty Act, Acts of 1895, c. 8, s. 5, all property passing either by will or intestacy, etc , shall be subject to a succession duty, etc., and by s. 7 the duties imposed, unless otherwise provided, shall be due and payable at the death of the deceased, or within ten months thereafter, etc.

M.P.B., by his last will, directed his trustees to invest a portion of his estate and pay the income arising therefrom to his brother C., and at their discretion to pay C. a portion of the principal, and, after the death of C, to pay the principal remaining to such uses and purposes as C. should by deed or will appoint. M.P.B. died on the 19th April, 1891, some four years before the passage of the Succession Duty Act. C. died on the 30th December, 1897, having exercised his power of appointment by will made the 3rd June, 1897.

Held, that the fund in question did not pass within the meaning of the Act, s. 5. by the exercise of the power of appointment by C., the appointees taking under the instrument creating the power, and not by virtue of the power itself.

Held also, that the Act, s. 7, must be construed as applying only to deaths occuring after the passing of the Act.

A. McKay, for plaintiff. *W. B. A. Ritchie*, Q.C., and *J. A. Chisholm*, for defendants.

Meagher, J.] JORDAN *v.* MACDONALD. [July 12.

Costs—Event— Where first verdict for plaintiff and second for defendant.

This was an action against a constable for damages for false imprisonment. The plaintiff was arrested by the defendant under a warrant issued against the plaintiff for assault upon another constable acting in the discharge of his duty. The arrest was made by the defendant in another county before endorsement of the warrant, and the plaintiff claimed that the arrest was therefore illegal. On the first trial, a verdict was found in favour of plaintiff, but the trial judge deprived the plaintiff of costs on the ground of misconduct, and gave no costs to defendant. The plaintiff appealed from this judgment, and the defendant applied for a new trial, which was granted, the plaintiff's appeal as to costs not having been considered. On the second trial a verdict

was found for defendant. Defendant applied for an order for judgment for the costs of both trials, and plaintiff opposed same on the ground that defendant was not entitled to such an order when the first verdict was against him, and also because the order of the first trial judge, depriving both parties of costs, was outstanding.

Held, that the defendant was entitled to the costs of both trials, and that the order of the Court of Appeal, granting a new trial, by implication, discharged the order of the first trial iudge on the question of costs.

Fulton, for defendant. *J. A. Chisholm*, contra.

Province of New Brunswick.

SUPREME COURT.

Full Court.] THOMSON *v.* CITY OF ST JOHN. [June 15.

Negligence—Tug injured in a harbour—Jury's findings—Weight of evidence.

In an action for damages for injury to a tugboat by a "dodger" in one of the slips of St. John harbour, the jury found that the damage was caused by the "dodger," and that the tug was properly in the slip at the time, but negatived a question as to the harbour master being guilty of negligence in not discovering the obstruction. The defendants had contended all through their case that there was no "dodger" in the place complained of. There was a great mass of testimony as to the harbour master's inspection of the harbour.

Held, on a motion for a new trial, a verdict having been entered for the defendants on the findings of the jury, that, although the plaintiff has made out a strong case, upon which the court might have found differently from the jury, there was not such a preponderance of testimony as would warrant the setting aside of the verdict.. MCLEOD, J., dissenting.

McLean, for plaintiff. *Skinner*, Q.C., for defendant.

Full Court.] LABELLE *v.* NORWICH UNION FIRE INSURANCE CO. [June 15.

Policy—Improper answer as to ownership of land—Agent's answer when real facts disclosed—Whether application a warranty.

Defendant company issued a fire policy on a building, owned by the plaintiff, which stood on the highway. In the application for the insurance, signed by the defendant, the question "are you the owner of the land on which the building stands?" was answered "yes," but it was proved on the trial that the plaintiff when making the application stated to the company's agent, who filled in the answers, that the building stood on the highway, and that the agent notwithstanding wrote down the answer "yes," stating at the same time that this was the proper answer under the circumstances. The application was not referred to in the policy except that the property was described "as per plan on the back of the application," and this reference was relied on as making the application part of the contract, and a warranty by

the insured, under the following condition, endorsed on the policy: "If an application, survey, plan or description be referred to in this policy it shall be a part of this contract, and a warranty by the insured."

Held, on a motion for a nonsuit, per Hanington, Landry and McLeod, JJ., Tuck, C.J., and Vanwart, J., dissenting, that this was not such a reference to the application as would make it, under the condition specified, a warranty by the insured, the plan on the back only being referred to, and not the application itself; also, that the agent of the company in incorrectly writing the answer to the question as to the ownership of the land, after the plaintiff had truthfully stated the facts, must be taken as having acted as the agent of the company, not of the insured, thereby precluding the company from taking exception to it.

Palmer, Q.C., and *Baxter* for plaintiff. *Earle*, Q.C., and *C. J. Coster* for defendant.

Full Court.] EXPARTE SIMEON JONES. [June 15.

Civic assessment—Taxes on income—Residence.

The applicant a few years ago transferred his business and all his real estate in the City of St. John to his children and removed to New York, where he had an office on Broadway in connection with his business in stocks and bonds, and boarded and lodged (when in that city) at Hotel Plazza. He continued a director, however, of the Bank of New Brunswick, which had its head office in St. John, and attended in the year 1897 sixty-five meetings of the Board at the City of St. John in that capacity, receiving therefor an allowance of $4.00 per meeting. He had also, since his removal to New York, spent regularly two months or more of the summer season in the Province, a part of which time he spent fishing, and the remainder in the city, living at his old home with his children, where he stayed on all other occasions also when he was in the city. He was assessed on his income as a resident of St. John, and, objecting thereto on the ground that he was not a resident of the city, the Board of Assessors heard evidence as to his residence, when the facts substantially as above were disclosed. At the hearing the applicant stated his domicile as at Hotel Plazza, New York, but the Board found, notwithstanding, that he was a resident of St. John.

Held, on motion to make absolute a rule nisi for certiorari, that the finding of the Board was warranted by the evidence, and that applicant was liable to assessment on income as a resident of St. John. Rule discharged.

Currey, Q.C., in support of rule. *C. J. Coster*, contra.

Full Court.] ROBINSON *v.* SCHOOL TRUSTEES OF ST. JOHN. [June 15.

Innocent holder of unauthorized school bond—Negligence of School Board—Estoppel.

Plaintiff was holder of a school bond, which bore the seal of the Board, the signature of the chairman of the Board (since deceased), and what purported to be the signature of J.M., the secretary (since removed). The Board never received any value for the bond, and claimed that its issue was unauthorized. The bond, however, got out and into the hands of W. and M.,

who hypothecated it to a bank, from which plaintiff received it. Both W. and M. had since died, and how they came in possession of the bond was not known. In an action for overdue coupons, E. M., who was employed in the office of the secretary of the School Board, testified that he was directed by a superior officer of the Board to fill in the bond under the designation of 277a, that he did so, and that subsequently he saw the bond lying on a table in the office with the seal of the Board affixed and bearing the signature of the chairman. J. M. swore that he did not sign the bond as secretary, and that the signature appended thereto as his was a forgery. The judge left it to the jury to find whether J. M. did in fact sign the bond, and also whether the Board or their officers were guilty of such negligence in connection with the bond as that it would be inequitable and unjust that the defendants should be permitted as against the plaintiff (an innocent holder for value), to set up that the bond was not duly executed, or the issue thereof unauthorized by the Board. The jury found in the affirmative.

Held, on a motion for a new trial, that the direction was proper, and the finding under the evidence warranted.

Pugsley, Q.C., and *A. G. Blair, jr.*, for plaintiff. *Skinner*, Q.C., for defendants.

VanWart, J.] O'LEARY *v.* LANAGAN [July 14.

Promissory note—Endorser—Waiver of notice of dishonour—No knowledge of non-presentment.

Plaintiff, in absence of presentment and notice of dishonour, sought to hold defendant as endorser of a promissory note on the following statement made by defendant to plaintiff after dishonour: "If he (the maker) doesn't pay I suppose I will have to." At the time the statement was made defendant was not aware that the note had not been presented.

Held, on review, that the defendant was not liable.

F. H. J. Bliss, for plaintiff. *Phinney*, Q.C., for defendant.

McLeod, J.] CARLING BREWING CO. *v.* FAIRWEATHER. [July 20.

Arrest—Affidavit to hold to bail—Words of statute—Variance—59 Vict., c. 28, s. 1—Cause of action—Goods bargained and sold—Averment of delivery.

On the ground that a defendant cannot be held to bail on an affidavit stating him to be indebted for goods bargained and sold without an averment of delivery, the arrest of the defendant on an affidavit of debt "for goods bargained and sold, and for goods sold and delivered," was ordered to be set aside.

It is not a sufficient compliance with 59 Vict., c. 28, s. 1, to state that the defendant is "justly and truly indebted" to the plaintiff, without stating that the debt is due.

Hazen, Q.C., and *Raymond*, for the plaintiffs. *Allen*, for the defendant.

McLeod, J.] CLARKE *v.* WEBBER. [August 1.

Chose in action—Action by assignee.

An assignee, under the Assignments and Preferences Act, 58 Vict., c. 6, (N.B.), may sue in his own name in an inferior Court for the recovery of a debt due the insolvent.

Geo. J. Clarke, for the plaintiff. *W. H. Trueman*, for the defendant.

McLeod, J.] LAWTON *v.* DUNN. [Aug. 25.

Attorney—Privilege.

An attorney of the Supreme Court cannot be sued in the City Court of Saint John.

J. L. Carleton, for plaintiff. *M. B. Dixon*, for defendant.

Barker, J.] JOHNSON *v.* SULLIVAN. [Aug. 26.

Specific performance—Evidence.

Specific performance of a parol agreement for the sale of an interest in land will not be granted unless the evidence of the plaintiff as to the agreement is so corroborated either by independent testimony or the surrounding circumstances, or both combined, as to leave no substantial doubt that the defendant's version of the transaction is erroneous, and that of the plaintiff's correct.

Barker, J.] CALHOUN *v.* BREWSTER. [Aug. 26.

Specific performance—Agreement—Treaty—Conflicting evidence—Dismissal of bill—Costs.

Where in a suit for the specific performance of an alleged agreement for the sale of land the Court held that the agreement had not been definitely concluded, and had not reached beyond treaty, though understood by the plaintiff to be an agreement, the bill was dismissed without costs.

W. B. Chandler, and *M. G. Teed*, for plaintiff. *H. A. Powell*, Q.C., for defendant.

SAINT JOHN PROBATE COURT.

Trueman, J.] IN RE COLWELL'S ESTATE. [Aug. 22.

Administration—Application by creditor—Delay of next of kin—Grant to next of kin—Costs.

Where a creditor of an intestate applied three months after the death of the intestate for grant of administration of the estate, and at the return of the citation letters were granted to the next of kin, the creditor was allowed his costs. *Cole* v. *Rea*, 1 Phillim. 428, followed.

A. A. Wilson, for creditor. *J. B. M. Baxter*, for next of kin.

ST. JOHN COUNTY COURT.

Forbes, Co. J.] IMPERIAL OIL CO. *v.* YOUNG. [August 5.

Review—Affidavit—Compliance with language of statute—58 Vict., c. 21.

An affidavit by the plaintiffs in an application for review from a Justice's Court, that they "believed a substantial wrong and injury had been done to them," etc.

Held, to be sufficient within 58 Vict., c. 21.

L. P. D. Tilley for the plaintiffs. *J. Roy Campbell*, for the defendant.

Forbes, Co.J.] STOCKTON *v.* MALLORY. [Aug. 22.

Garnishee—Defence by debtor—Hearing—45 Vict., c. 17.

An order under s. 7 of 45 Vict., c. 17, was served upon the judgment debtor in addition to the garnishee, and at the return the judgment debtor gave evidence in disproof of the existence of the debt sought to be garnisheed. The judge having pronounced in favor of the validity of the debt the judgment debtor now applied under s. 16 of the Act to discharge the debt from attachment on the ground that the proceedings under s. 7 only affected the garnishee and could not bind the judgment debtor. Application granted.

C. A. Palmer, Q.C., for judgment creditor. *H. A. McKeown*, for judgment debtor.

Forbes, Co.J.] BANK OF MONTREAL *v.* CROCKETT. [August 23.

Specially indorsed writ—Acceptance of service by attorney—Appearance and plea—Summary judgment.

Acceptance of service and undertaking to appear were indorsed by defendant's attorney on a specially indorsed writ. On an application to set defendant's appearance and plea aside, and for leave to sign judgment for want of a defence, defendant contended that it would leave the proceedings as though default had been made in the undertaking of defendant's attorney, giving rise to an attachment against him, but not entitling plaintiff to judgment, since there was no service upon the defendant. Application granted.

E. F. Jones, for the plaintiff. *D. Mullin*, for the defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] SCARRY *v.* WILSON. [June 27.

Trustee and cestui-qui-trust—Costs—Appeal as to costs.

This was an action against defendant for a reconveyance to the plaintiff of certain lands which she had for her own purposes, and by the advice of her solicitor, conveyed to defendant to hold in trust for her, and asking an account

of the money which defendant had received by mortgaging the property. The statement of claim also charged misconduct in various ways. The statement of defence offered to reconvey the property and account for all moneys received, but defendant claimed a sum of $100, which he alleged that the plaintiff had agreed to allow him for his services as trustee. The trial judge found that plaintiff had agreed to pay the $100, but in ordering the reconveyance and taking of accounts, he directed that no remuneration be allowed to the defendant, and declined to make any order for costs. The defendant appealed on both grounds.

Held, (1) that defendant should be allowed the $100 remuneration agreed on. (2) Following Hill on Trustees, 566, and cases there cited, no misconduct having been proved, that the defendant was entitled to his costs as between solicitor and client. (3) That an appeal as to costs may be heard and decided when, as here, the appellant succeeds on another substantial ground of appeal: *Harpham* v *Shacklock*, 19 Ch. D. 215.

Semble, that an appeal as to costs may sometimes be entertained when the appellant raises another ground of appeal, not merely colourable, although he does not succeed in it; or where the giving or withholding of costs is not wholly discretionary, as in the case of a trustee guilty of no misconduct: *Farrow* v. *Austin*, 19 Ch. D. 58; *Turner* v. *Hancock*, 20 Ch. D. 303; *Re Knight's will*, 26 Ch. D. 82.

Howell, Q.C., for plaintiff. *Ewart*, Q.C., for defendant

Killam, J.] ALLEN *v.* CLOUGHER. [Aug. 18.

Costs—Scale of costs—Practice.

The plaintiff recovered a verdict in the Queen's Bench for $101.09 in a suit on two promissory notes amounting with interest to $532.47. No certificate for costs was granted, but the plaintiff contended that the evidence showed that the action was really one for the balance of an unsettled account, exceeding in the whole $400; and on that account not of the proper competence of a County Court, and that no certificate was necessary. On an application to a Judge for a direction to the taxing officer as to the scale on which the costs should be taxed,

Held, that in the absence of a certificate from the Judge before whom the action had been tried, the record alone and not the evidence should be looked at.

So far as the reoord showed the action to be within the proper competence of a County Court, and, following the statute, only County Court costs should be allowed to the plaintiff, and the defendant was entitled to tax his costs of the action as between attorney and client, and to set off against the plaintiff's costs and verdict so much of such costs of defence as exceed the taxable costs of defence which would have been incurred in the County Court. Costs of the application allowed to the defendant.

Phippen, for plaintiff. *Allen* and *Cameron*, for defendant.

Province of British Columbia.

SUPREME COURT.

McColl, J.] STEELE *v.* PIONEER TRADING CORPORATION. [June 16.

Practice—Judgment debtor—Corporation—Examination of officer of—Nulla bona.

Application to examine A. J. Mangold, as an officer of the defendant company under Rule 486. The defendant company was formed in England for the purpose of exploring for and acquiring mining properties in British North America, and Mangold held an unlimited power of attorney from the company to act for it within any part of such territory. An execution against defendant's goods had been issued, and no return had been made.

Held, that a judgment debtor is examinable under Rule 486, notwithstanding that a fi. fa. in the sheriff's hands has not yet been returned nulla bona. Rule 486 is in aid of execution and differs from the Ontario enactment under consideration in *Ontario Bank* v. *Trowern*, 26 C.L.J. 190, which is in aid of attachment of debts. Order for examination made.

J. H. Senkler, for plaintiff. *J. A. Russell*, contra.

Bole, Local Judge.] SMITH *v.* YOUNG. [July 20.

Indian marriage—Validity of.

The plaintiff sued as mother and next to kin of J. W. S., deceased, for the purpose of being declared entitled to receive money in court to the credit of her son's estate, all his debts having been discharged by the defendant and his predecessor in office as official administrator of Nanaimo District. The plaintiff, an Indian of the Cowichan tribe, married John Schmidt, father of J. W. S., in 1868, according to the custom of the Cowichan tribe; they lived together far many years, and had one child, the said J. W. S., who was born in 1870. The father died in 1890, and by his will left all his property to his said son, who died unmarried and intestate in 1892. The estate was administered by the official administrator, and there is now a sum of money standing to the credit thereof. At the time of the Indian marriage both parties were at all events nominally Christians, and had abundance of facilities for being married in accordance with the laws of the then colony of British Columbia.

Held, that the Indian marriage was invalid. Judgment for defendant; costs of all parties to be paid out of the estate.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie*, 6 App. Cas. 364 distinguished.

R. L. Reid, for plaintiff. *R. McBride*, for defendant.

Walkem, J.] GILL *v.* ELLIS. [August 8.

Practice—Vacation—Trial pending—Rule 736 (d).

The trial of this action was set down for 29th July, in Victoria, and on that day there being no judge available to take the trial, it was by consent adjourned into vacation by WALKEM, J. The case came up for hearing on 8th August, and counsel for defendant objected to the trial proceeding during the vacation. August and September are the vacation months in B.C.

Held, that the trial was not "*pending*" within the meaning of the vacation Rule 736 (d), and it would have to be adjourned until after vacation.

L. P. Duff, for plaintiff. *A. P. Luxton*, for defendant.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1898.

Tuesday, Feb. 8th, 1898.

Present: Between 10 and 11 a.m, the Treasurer and Messrs. Barwick, Bayly, Edwards, Hoskin, Idington, Kerr, Martin, McCarthy, Strathy, Watson, and after eleven, Messrs. Aylesworth, S. H. Blake, Gibbons, Osler, Wilkes.

The consideration of the Report of the Legal Education Committee upon the proposals of the principal as to honours and compulsory attendance on lectures was deferred until the first meeting of Convocation in Easter Term next.

Mr. Watson from the Finance Committee reported as follows: That their attention has been drawn to the advertisement of one J.B.D in the *Brampton High School Gazette*, in which he describes himself as a solicitor. They have made enquiries of Mr. Austen the local registrar of the High Court at Brampton, and have received from him the accompanying letter, which with the newspaper containing the advertisement they submit for the consideration of the Benchers. The report was referred to the Discipline Committee for investigation and report.

Ordered that the application for call of Mr. W. J. McCamon, a solicitor of five years' standing, and the application for certificate of fitness of Mr. Lennox Irving, a solicitor of five years standing, be referred to a special committee, consisting of Messrs. Bayly, Edwards and Wilkes, to subject these gentlemen respectively to examinations under the Statute 57 Vict., c. 44. Ordered that Mr. G. A. Payne, a solicitor of ten years standing, be called to the Bar, and that Mr. G. L. Taylor, a barrister of ten years' standing, do receive his certificate of fitness as a solicitor.

It was, on motion of Mr. Edwards, seconded by Mr. Kerr, ordered that it be referred to a joint committee, composed of the Legal Education and Finance Committees, to consider and report upon the advisability of increasing the fees of students with the view of making the Law School as far as possible self-supporting. Ordered that Mr. Shepley be convener of said Committee.

Ordered that it be referred to the Committee on Journals and Printing to report upon the propriety of establishing a system for giving notice to members of Convocation of the business to be laid before Convocation, particularly as follows: Notice of all business to come before Convocation during Term, and of which notice has been given, or which has been directed to be taken up at any of its meetings, or which has been referred to a committee to report upon, and that the said committee be requested to report upon the first day of Convocation next Term.

Mr. Barwick gave notice of motion for leave to introduce to-morrow the following rule: The proceedings of the Benchers in Convocation shall be conducted as much as may be according to the ordinary Parliamentary mode.

Mr. Strathy, in the absence of Mr. Aylesworth, Chairman of the Library Committee, presented the Librarian's annual report on the state of the Library. The report was adopted, and it was ordered that same be printed and distributed to the profession with the next number of the reports.

Mr. Strathy, in the absence of Mr. Shepley, presented the various reports of the Legal Education Committee.

Ordered that Mr. L. F. Clarry, and Mr. W. Barclay Craig, be called to the Bar and receive their certificates of fitness.

The report of the Committee on the results of the Second and Third Year Examinations held before Christmas in certain of the subjects of these years was received.

The case of the complaint of Mr. J. O. Connors against Mr. T. C. Robinette, barrister and solicitor according to the order of Convocation of the 16th of November last, was considered. Ordered that Mr. Robinette be reprimanded by the Treasurer in the presence of Convocation. Mr. Robinette was called before Convocation and reprimanded by the Treasurer.

Mr. Bayly, from the Special Committee appointed to examine Messrs. McCamon and Irving, reported that each of these gentlemen had passed a satisfactory examination. Ordered that Mr. McCamon be called and that Mr. Irving receive his certificate of fitness.

Mr. Watson then moved, pursuant to notice given, to rescind the resolutions of Convocation relating to the publication of a Century Digest: Yeas, Messrs. Edwards, Kerr, Aylesworth, Watson and Barwick. Nays, Messrs. Martin, Idington, Wilkes, Blake, Hoskin, Osler, Strathy, Bayly and McCarthy. Lost.

The report of the Reporting Committee, dated 5th February, 1898, with respect to the Century Digest was read as follows: "Your Committee have had under consideration the resolution of Convocation of the 16th November last with reference to the cost of editing and compiling the proposed Century Digest, and they beg to report as follows: "It is estimated that the Digest will contain 5 200 pages. Upon this basis, the total cost of editing and compiling is placed by the editor, Mr. J. F. Smith, at $18,200, and your Committee advise Convocation to place the work in the hands of Mr. Smith, under a formal contract to be executed on the basis of $18,200, being the outside sum which his services are to cost the Society. From the above sum should be deducted at the rate of $3 per page should the work fall short of the estimated number of pages as above. There should be paid by the Society to the editor as the work progresses such pro rata sum as Convocation may determine from time to time. The Editor is to report to Convocation each Term as to the condition of the Digest, and Convocation are to be at liberty to call for extra compilers being appointed so as to speed the work from time to time without thereby increasing the total sum payable as above." The Report was adopted. Convocation ordered that the contract be submitted to Convocation before being executed on behalf of the Society.

The following gentlemen were then called to the Bar: L. F. Clarry, W. Barclay Craig, G. A. Payne, W. J. McCamon.

Mr. Watson, from the Finance Committee, presented the annual report of receipts and expenditure for 1897.

The report of the Legal Education Committee on Mr. C. C. Grant's application for admission as a student-at-law was taken into consideration, and it was ordered that Mr. Grant could not be allowed admission. The same Committee further reported as follows: The Committee have considered the report of the Examiners in respect to Mr. J. C. L. White, who was permitted to write on the subjects of Practice, Equity and Evidence of the Second Year. No paper was set for him in Practice for reasons set out in the letter of Mr. Kingsford to the Secretary submitted herewith. Mr. Hoyles disclaims any knowledge of the matter, and says he was not consulted upon the subject. The Committee, while recommending that under the circumstances, Mr. White be allowed to write in Practice at the Easter Examinations, cannot do otherwise than to report to Convocation its regret that the senior Examiner should have assumed that he had authority to disregard the directions of Convocation. The report was adopted. The case of Mr. J. C. E. being mentioned, and correspondence bearing upon his case being read, the matter was directed to stand over to be reported upon by the Legal Education Committee.

Upon reading the letter of Mr. N. F. Paterson, Q.C, accompanied by a circular of one C. G. S., it was ordered that the same be referred to the Discipline Committee for enquiry and report. Ordered that the complaint of His Honour Judge Dartnell against Mr. S. S. S., a student-at-law, be referred to the Discipline Committee for investigation, and report. Ordered that the complaint of D. D. Reid and Marian Reid against Mr. J. M. G. be referred to the Discipline Committee for enquiry. and report. Ordered that the complaint of Mrs. Wessner against Mr. O. E. K. be referred to the Discipline Committee for enquiry, and report.

Mr. Martin, from the County Libraries Committee reported upon the application of the County of Perth Law Association for a loan under the provisions of Rule 83. Ordered that an advance or loan of $325 be made to the said Association repayable in ten equal yearly payments.

The letter of Mr. W. F. Langworthy, barrister, Port Arthur, dated 26th January, 1898, on behalf of members of the profession in the District of Thunder Bay with reference to the establishment of a local law library at Port Arthur was read, and the matter referred to the County Libraries' Committee.

Wednesday, Feb. 9th.

Present: The Treasurer and Messrs. Aylesworth, Barwick, Guthrie, Robinson and Watson.

Mr. Barwick, in pursuance of notice given yesterday moved for leave to introduce a rule to be inserted after Rule No. 16 in page 12 of the printed rules of 1896: "(16a) The proceedings of the Benchers in Convocation shall be conducted as much as may be according to the ordinary Parliamentary mode." Convocation granted leave accordingly, and the draft rule was read a first and second time.

Friday, Feb, 18th.

Present: The Treasurer, Messrs. Barwick, Bayly, Bruce, Martin, Osler, Ritchie, Robinson.

Ordered that Mr. McBride, whose notice has remained duly posted, be called to the Bar, and Mr. G. F. Kelleher, who has attended additional lectures required, be called to the Bar and receive his certificate of fitness.

Mr. Osler from the Reporting Committee presented the quarterly report of the editor on the state of the reporting, as follows: "I have to report that there are in the Court of Appeal 25 unreported judgments, 15 of November, which will issue this week, and 10 of January. In the High Court Mr. Harman has 2, 1 of November ready to issue, and one of February. Mr. Lefroy has nothing unreported. Mr. Boomer has 5, of which 2 of November are ready to issue, and 3 of February. Mr. Brown has 17 cases unreported, 9 of December, ready to issue, and 8 of January. There are 16 unreported practice cases, 12 of December, ready to issue, and 4 of January. The Digest to the last Practice Volume, just closed, is ready to issue. The Digest of the Volume of Appeal, which will be closed this week, is in type, and the Digest of Volume 28 O.R. will be in the printers' hands early in the ensuing week."

Mr. Osler then presented the draft contract for the compilation of the Digest in pursuance of the direction of Convocation. Mr. J. F. Smith, Q C., the Editor, was in attendance by request. The terms of the draft contract were discussed, and as a result some suggestions made were ordered to be embraced therein, and the draft as re-read after emendations, was approved. The Reporting Committee were ordered to have the contract engrossed, with power to make alteration not affecting the substance, the contract to be then duly executed.

Mr. Barwick then moved the third reading of the rule which had been twice read on the 9th inst. The said rule was then read a third time and passed: "16 (a) The proceedings of the Benchers in Convocation shall be conducted as much as may be in the ordinary Parliamentary mode."

Messrs. James McBride and G. F. Kelleher were then introduced and called to the Bar.

Ordered that the letter of Messrs. Jarvis and Vining be referred to the Finance Committee, with a request to report to Convocation.

Mr. Bruce, from the Discipline Committee, reported upon the complaint of Mrs. Wessner against Mr. O. E. K., solicitor, that the matter had been adjusted between the parties and the complaint withdrawn, and that in the matter of the complaint of M. J. Reid and D. D. Reid against Mr. J. M. G., a prima facie case had not been made out. The Committee were discharged from the further consideration of these two cases. Mr. Bruce, from the Discipline Committee, reported that in the matter of the complaint against Mr. J. B. D., a prima facie case had been made out. Ordered that the said complaint be referred to the Discipline Committee for investigation, and report.

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The effort to promote uniformity of legislation among the various states of the Union still continues, thirty-two of them maintaining commissioners for that purpose. Negotiations are being carried on for the uniformity of laws in reference to negotiable instruments, and more recently an attempt is being made to perfect the details of a bill to provide for uniformity of procedure in divorce cases. A writer in one of our exchanges therefore thinks that uniform legislation may not, after all, be merely an impossible dream. The Canadian Bar Association will prove its usefulness if in any way it promotes uniformity of laws in the Dominion, and having already taken ground in that direction will, we trust, continue the good work. A letter on this subject appears in another place.

Our English contemporary, the *Law Times*, refers to complaints of the profession as to some judicial methods of shortening cases, such as the judge telling the defendant's counsel at the close of a plaintiff's case that he has no case, or asking the jury whether they think there is any libel or any fraud, and generally expressing his own opinion about the case more or less definitely, so as to render a further contest unavailing. The writer correctly says, "Speed is not justice. There is no royal road to the end of the law suit. Facts are for the jury and not for the judge, who should reserve comment as much as possible until called upon to sum up." And again, in referring to an observation of Mr. Justice Phillimore the same journal speaks thus: "This is fast becoming an age of extra judicial utterances from the Bench, which is a habit to be most strongly deprecated."

We record the following judicial appointments recently made. Mr. Justice McColl, puisne judge of the Supreme Court of British Columbia, has been promoted to the position of chief justice of that province, and Mr. Archer Martin, of the city of Victoria, takes the place thus vacated. We note that the Government has not gone outside the province in these appointments. We have already had occasion to refer to this matter, see ante p. 254. The following appointments have been made to the County Court bench; in New Brunswick, Mr. William Wilson takes the place of Judge Steadman, and in Ontario Mr. Patrick McCurry becomes Judge of the Parry Sound district, and Mr. Thomas W. Chapple now occupies the same position in the provisional judicial district of Rainy River. The county of Victoria and the county of Ontario have taken to themselves junior judges in the persons of Mr. John E. Harding, Q.C., of the city of Stratford, and Mr. D. J. McIntyre, Q.C., of the town of Lindsay, respectively. Mr. John F. Monck, of the city of Hamilton, becomes junior judge of the county of Wentworth. Mr. C. A. Dugas, Sessions judge of Montreal, has been made judge of the Yukon judicial district.

On July 1st there went into force in the United States a uniform bankruptcy law, a copy of which has just been published by the Washington Law Book Co. Much confusion had resulted in the various states from the fact that each state controlled its own territory in respect of insolvency legislation until a federal law should be passed, such as the one above mentioned. The state laws differed greatly, and in some cases placed creditors resident in other states or jurisdictions at a serious disadvantage. The plan of the English Bankruptcy Act appears to have been largely followed in the compilation of the new statute. Exemptions from executions will, however, remain subject to the state laws, and are to be allowed to bankrupts as prescribed by the laws in force at the time of filing petition, in the state wherein they have had their domicile for the six months or the greater portion thereof

immediately preceding the filing of the petition. Any person, but not a corporation, may take the benefit of the Act as a voluntary bankrupt, but involuntary or enforced bankruptcy is not to apply to a wage-earner, or a person engaged chiefly in farming, or the tillage of the soil. Mercantile corporations are made subject to involuntary bankruptcy only in case they owe debts of $1,000 or over.

MASTER AND SERVANT.

RIGHT TO TERMINATE A HIRING, THE DURATION OF WHICH IS NOT EXPRESSLY PROVIDED FOR BY THE PARTIES.

I. General Principles.

1. **Introductory**—The elaborate judgment of the Ontario Court of Appeal in the recent case of *Harnwell* v. *Parry Sound Lumber Co.* (*a*), has drawn attention once more to the incidents of contracts of hiring, the duration of which has not been expressly provided for by the parties, and, as the correctness of that decision has been seriously doubted by many members of the profession, a complete and detailed review of the authorities can scarcely fail to be of interest to our readers.

A discussion of such contracts divides itself naturally into two branches. In one of these the question to be investigated is: How long did the parties, at the time they entered into the agreement, intend that it should be binding? The other deals with the extent of their rights in respect to the severance of their connection before the end of the contemplated period. Since the duration of the hiring, in so far as it is inferred merely from what occurred at its inception, becomes, for practical purposes, a wholly immaterial circumstance, if it is once established that the contract is subject to rescission by the act of the employer or the employed, the

(*a*) (1897) 24 Ont. App. 110. See sec. 16, *post*.

issue to be decided in actual litigation is usually whether this is one of the incidents of the service. For this reason the boundary line between the two branches of the inquiry is apt to be lost sight of in actual trials. The exigencies of a logical analysis, however, demand that proper account shall be taken of the fact that there really is such a boundary line, and in the following article, therefore, the cases will be arranged with due reference to its existence.

2. Theory upon which the Duration of a General Hiring is determined—As in all other cases where the construction of a contract involves the necessity of ascertaining the intention of the parties in respect to some essential matter for which they have made no express provision, the duration of a hiring which is indefinite as to time is, as a question merely of practical procedure, susceptible of determination either as a question of law, or as dependent on a rebuttable presumption, or as an entirely open issue to be settled by the jury or other triers of facts, in view of all the testimony introduced.

The theory that the duration is properly one to be settled as a matter of law emerges in some of the cases, and has even been deemed sufficiently important to deserve a formal refutation (sec. 5, *post*); but, according to the great weight of authority, both in England and the United States, the proper starting point in an inquiry of this description is a presumption of fact. Manifestly, however, the line which separates the domain of the theory that the question is to some extent controlled by a presumption of fact, and the domain of the theory that it is to be determined from all the circumstances, is difficult to fix with precision, except in those not very numerous cases in which no testimony is offered which can, by any possibility, overcome the prima facie inference that the service was intended to continue for a certain period (*a*). When any such testimony has been introduced, the correctness of that inference obviously becomes a disputable point, and the duration of the engagement must then be decided

(*a*) See for example *Buckingham* v. *Surrey Canal Co.* (1882), 46 L.T.N.S. 885 [sec. 4, *post*].

simply by the weight of evidence. That is to say, the investigation, although it may set out with a presumption of fact, will be pursued, after a certain stage, which, in practice, is usually reached, upon a footing which is virtually the same as that upon which it would have stood if no presumption had been indulged. It is doubtless a result of this inevitable convergence of the lines of inquiry indicated by these two possible aspects of the cases under review, that some judges have expressed themselves in language suggesting a doctrine which would eliminate entirely the factor of a presumption, and that some of the actual rulings of the courts have even been supposed to embody this doctrine (*a*). That this doctrine, if any such can really be extracted from the actual decisions, is contrary to the overwhelming weight of authority will, we think, be readily conceded after a perusal of the following sections.

3. Indefinite Hiring, presumptively for a Year—The general rule applied by nearly, if not quite all the English judges (*b*), may be enunciated in its simplest form as follows: It is a rebuttable presumption of fact that a general hiring without mention of time is obligatory for at least one year, and therefore subject to all the incidents of an entire contract of that duration, irrespective of the question whether those incidents enure to the benefit or prejudice of the parties. (*c*)

(*a*) See sec. 16, *post*.

(*b*) It is asserted in Wood's Law of Master and Servant (sec. 96) that in the United States an indefinite hiring is *primâ facie* a hiring at will; but this statement of the rule, although it has been adopted as correct, at least one court of high standing in that country (see *McCullough, etc., I. Co.* v. *Carpenter* (1887) 67 Md. 557), is, to say the least, too sweeping. The English doctrine is accepted without reservation in New York and in Massachusetts; *Adams* v. *Fitzpatrick* (1891) 125 N.Y. 124; *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57. Perhaps, however, it may be said, as to most of the States, that, for obvious social and economic reasons, a hiring for a shorter period than a year will be more readily inferred in that country than in England: *Bascom* v. *Shillito* (1882), 37 Ohio St. 431. It would, therefore, be undesirable, in an article designed for Canadian readers, to rely upon the American authorities, and they will not be referred to except in cases in which this tendency is not an operative element in the moulding of the decision of the court, and they will serve to corroborate some English ruling.

(*c*) Attempts have been made, but, as we venture to think, without much success, to explain the origin of this presumption. Judge Story suggests (Contr. 1290) that it was established in order to give the master and the servant the benefit of all seasons. According to Mr. Macdonnell (Master & Servant, p. 167), "a more probable explanation of it is that it arose in consequence of the statutory enactment

"If a man retain a servant generally, without expressing any time, the law shall construe it to be for one year, for that retainer is according to law." (*a*)

"Wherever the relation of master and servant is to continue an indefinite time, and cannot be put an end to at the election of either party without notice, there the hiring must be understood to be a hiring for a year." (*b*)

"There can be no doubt that a general hiring is a hiring for a year." (*c*)

"If a master hire a servant without mention of time, that is a general hiring for a year" (*d*)

"The general rule is that if a master hire a servant without mentioning the time, that is a general hiring, and in point of law a hiring for a year." (*e*).

"As a general rule, where the hiring is a yearly hiring it cannot be put an end to by either party before the end of the year." (*f*)

It was assumed by all the judges summoned by the House of Lords to give opinions in *Elderton* v. *Emmens*, (*g*) and presumably conceded by the House of Lords itself, that the effect of a resolution entered in the minute-book of a company, by which a person was to receive, as the company's solicitor, a salary of $100, in lieu of his rendering an annual bill of costs, as he had previously been doing, was to bind the company to retain him in its employment for at least a year, the sole point of controversy being whether it was also bound to give him business to transact during that time.

(5 Eliz. c. 4, sec. 3 and 7, and other statutes), that hirings should be by the year." The objection to the first theory is that "the benefit of all the seasons" could hardly be of any special importance except in the employment of laborers doing outdoor work, and that the common law must, from a very early period, have found it necessary to formulate some doctrine as to other kinds of service. The second theory would require us to assume that the courts, by a species of judicial legislation, extended the rule prescribed by statute for one particular class of employees, viz., those engaged in manual labour, to other employees who did not come within the purview of the statute. The present writer, while willing to admit that this view may possibly be correct, ventures to think that a much simpler and more reasonable hypothesis is that the statutory provision was itself merely a recognition of a well understood custom, having its origin in economic and social conditions. This explanation has at least the advantage of referring the rule to a source from which a large part of the so-called unwritten law has been derived, and obviates all necessity for the rather violent supposition that the legislature at the particular period which gave birth to the statute, added an entirely novel incident to the contract of service.

(*a*) Coke Litt., 42, 6: The same doctrine is laid down in Fitzherbert's Nat. Brev. p. 168, H.; Comyns Dig., Tit. Justices of Peace, B. 58.

(*b*) *Rex* v. *Hampreston* (1793), 5 T.R. 205. To the same general effect, see *Rex* v. *Great Yarmouth* (1816) 5 M. & S. 114.

(*c*) *Beeston* v. *Collyer* (1827) 4 Bing. 309, per Gaselee J.

(*d*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, per Best, C. J.

(*e*) *Fawcett* v. *Cash* (1834), 3 N. & M. 177; 5 B. & Ad. 904, per Denman, C.J.

(*f*) *Buckingham* v. *Surrey, etc., Canal Co.* (1882), 46 L.T.N.S. 885, per Grove, J.

(*g*) (1853) 4 H. of L. 624. Crompton, J. "concurred entirely with the judgment of the Exchequer Chamber, as to the company being bound to continue the relation of employers and employed, at least for a year," and said that "supposing the case one of employment and service, the words of the contract appeared to him as strong in favour of the engagement lasting through the year, as the words in *Fawcett* v. *Cash*." Platt, B., said: "This agreement appears to me to have established the relation of employer and employed for the period of a year, at a salary of £100." Coleridge, J., said: "It seems to me that this was clearly an agreement for a year certain."

To the same effect see the following text books: Addison Contr. (9th ed.) p. 844; Smith's Mercantile Law (10th ed.) p. 521; Chitty Contr. (12th ed.) p. 640; Story Contr., sec. 962 (c).

4. Same Subject Continued: Illustrative Decisions — Concrete illustrations of the general principle stated in the foregoing section are furnished by the subjoined decisions as to contracts affecting various employees. The effect of the cases is so stated as to show precisely the extent of the power assumed by the courts in drawing inferences from the testimony.

Where the only evidence is that a person was hired to work as the foreman of silk manufacturers, and to have wages at the rate of $80 a year, there is nothing to repel the ordinary presumption that he was hired for an entire year. (*a*)

An agreement to serve as a steward from a certain date for a specified salary per annum creates an engagement for a year. (*b*)

Where the evidence is merely that the plaintiff entered the defendants' employ at a certain salary, the only two possible suppositions as to the nature of the hiring are that it is a hiring by the year, or a general hiring without any particular agreement as to time (*c*).

In *Davis* v. *Marshall* (*d*) Pollock, C.B., said with regard to a man hired to manage a shop and keep accounts: "This position and employment, coupled with the hiring at £30 a year, are sufficient to establish a yearly contract." (For a full statement of this case see sec. 9, *post*).

Evidence that the plaintiff entered the service of the defendant, an army agent, as a clerk upon a yearly salary, which had at one time been paid quarterly, but was paid monthly during the last six years of the service will warrant a jury in finding that the hiring was a yearly one, and terminable only at the end of a current year. (*e*).

A hiring of an engineer under a resolution of a company, at a specified annual salary is primâ facie a hiring for a year certain. (*f*)

(*a*) *Turner* v. *Robinson* (1833), 5 B. & Ad. 789; 2 N. & M. 829.

(*b*) *Forgan* v. *Burke* (1861), 12 I. R. C. L. 495 [verdict for plaintiff in accordance with this rule held to have been rightly directed].

(*c*) *Broxham* v. *Wagstaffe* (1841), 5 Jur. 843, per Parke, B.

(*d*) (1861), 4 L. T. N. S. 216.

(*e*) *Beeston* v. *Collyer* (1827), 4 Bing. 309. To the same effect see *Huttmann* v. *Boulnois* (1826), 2 C. & P. 510, per Abbott, C.J., negativing the contention that this doctrine only applied to domestics and servants in husbandry. In *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637 (nisi prius case), it was not questioned by either side that the hiring of a clerk whose salary was fixed at so much "per annum" by a resolution entered on the company's minute book, was a yearly hiring. (See post as to termination by notice.) The doctrine that the hiring of a clerk is presumptively yearly was also recognized in *Parker* v. *Ibbetson* (1858), 4 C.B. N.S. 346.

(*f*) *Buckingham* v. *Surrey, etc., Canal Co.* (1882), 46 L. T. N. S. 885. Grove, J., said: "It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence, the hiring was a hiring for a year. There is nothing to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff established a primâ facie case of a yearly hiring, and therefore in the absence of any evidence of custom to rebut that primâ facie case I think the verdict ought to stand."

Unless something to the contrary is said at the time of the hiring, the engagement of a person employed to supply a particular department of a newspaper,—as for instance the leading article, or reports of the parliamentary debates,—is understood to be for a year. (*a*)

The proposition that, if unexplained, a general hiring of a surgeon's assistant, is to be taken as a hiring for a year has been recognized, *arguendo*, as correct. (*b*)

The rule based upon the presumption is carried to its strict logical consequences in favor of the master, as is very strikingly indicated by the ruling in *Turner* v. *Robinson* (*c*), where a servant who was dismissed for good cause during a current year was held not to be entitled to recover compensation for his actual services, on the ground that the contract was an entire one.

The length to which a Court of Equity will go in enforcing this class of contracts is shown by *Stiff* v. *Cassell*, (*d*) where it was held that a prima facie case was made out for enforcing by injunction a stipulation of an author to write only for publications of a specified class within the period covered by an indefinite hiring, which the Court held to be one for a year.

The effect of the doctrine, from the pleader's standpoint, is strongly emphasized in such rulings as these:

Where the servant enters an employment under a general hiring, and continues to discharge the same duties for several years, the contract is properly declared upon as one for a whole year in the first instance, and afterwards as long as the plaintiff and defendant shall respectively please until the expiration of the current year from the date at which the service originally began (*e*).

A general hiring of a servant as a labourer in husbandry is, in law, a

(*a*) *Holcroft* v. *Barber* (1843), 1 C. & K., 4. There Wightman, J., submitted to the jury the question whether this rule was applicable in the case of a monthly paper, to be sent to India as a sort of speculation, but the defendant had a verdict on the ground that the plaintiff was not hired as an editor, and the question was not answered. In *Baxter* v. *Nurse* (1844), 6 M. & G. 935, (see sec. 5 *post*), Coltman, J., remarked that the question whether, in the case of an editor of a literary publication, a general hiring was to be considered as necessarily an engagement for a year, had never been decided.

(*b*) *Bayley* v. *Rimmell* (1836), 1 M. & W. 506, per Parke, B.

(*c*) (1883), 5 B. & Ad. 789, 2 N. & M. 829.

(*d*) (1856), 2 Jur. N. S. 348.

(*e*) *Beeston* v. *Collyer* (1827), 4 Bing. 309.

hiring from year to year, and will not support a count in a declaration which is based on the theory that it is one determinable at any time on reasonable notice. (*a*)

Under the old rules of pleading it was held that, if the servant was dismissed without cause during the currency of the year embraced by the contract, he could not recover in the common counts, but must either wait till the end of the year, or declare specially (*b*).

See also the cases in III. *post*, as to the termination of the service by notice.

5. Presumption that general hiring is yearly, not a presumption of law—That the presumption of a yearly hiring which is indulged when there is no mention of time is really regarded as a mere presumption of fact and not one of law, is sufficiently indicated by the circumstance that even the most unqualified statements of the rule occur as parts of opinion reviewing the findings of juries or other triers of facts. (*c*) Some of the decisions cited above show that the court is warranted in taking the case from the jury, or in directing a verdict, upon the theory that there is no evidence to rebut the presumption,—though even in very clear cases trial judges have declined to take either of these courses (*d*). But more direct expressions of judicial opinion as to the true nature of the presumption are not wanting. Thus in one case we find Lord Denman remarking:

(*a*) *Lilley* v. *Elwin* (1849), 11 Q.B. 742. Compare the remark of Gaselee J., to the effect that the understanding that a contract for domestic service may be dissolved before the end of the year merely by giving notice, (see sec. 11, (*c*.) *post*) does not seem to prevail in regard to servants in husbandry: *Beeston* v. *Collyer* (1827), 4 Bing. 309. The same doctrine is assumed without any argument in many of the settlement cases cited in this article. See for example: *Rex* v. *Birdbroke* (1791) 4 T.R. 245; *Rex* v *Lyth* (1793) 5 T.R. 327; *Rex* v. *St. Mary* (1815) 4 M. & S. 315.

(*b*) *Broxham* v. *Wagstaffe* (1841), 5 Jur. 843.

(*c*) The numerous affirmations of the general rule which we find in the settlement cases refer, it should be remembered, to the findings of justices of the peace, whose functions in this regard were identical with those of a jury. It has been expressly ruled that whether there was a hiring for a year is in most cases a question of fact for the justices to determine: *Rex* v. *Bottesford*, 4 B. & C. 84.

(*d*) In *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637, we find the following remarks in the charge of Byles, J.: "I am very strongly of opinion that a hiring simply for a year, as in the present case (of a clerk) cannot be determined by a three months' notice, and my only doubt is whether I should not direct the jury that, if they believe the evidence given, there was an absolute hiring for a year. It is perhaps safer to leave the question to the jury."

"In some instances the nature of the contract is, in fact, so well understood that it is often put as matter of law. Still it is always a matter of fact." (*a*)

But the case in which this distinction is brought out in the clearest relief is *Baxter* v. *Nurse* (*b*), the great importance of which justifies an extended statement of its incidents and effect.

The plaintiff declared in a special contract to employ him as editor of a certain periodical, for a year, at a salary of £3 3s., to be raised progressively when the work should reach a certain circulation, and assigned as a breach his dismissal before the expiration of the year. At the trial the terms on which the plaintiff was engaged were not proved; but it was shown that, after the commencement of the publication, the defendant had paid him three guineas a week. The defendant abandoned the enterprise after the third number of the review had been issued, but the publication was continued by another person. The plaintiff called several witnesses to prove that, in the absence of any stipulation to the contrary, a general engagement as an editor of such a work is understood to be an engagement by the year; but, upon cross-examination, they admitted that they spoke with reference to established works, and not to new speculations. Tindal, C.J., left it to the jury to say whether there had been a contract for the period of a year, observing that the rule spoken of by the plaintiff's witnesses might be useful and proper in the generality of cases, but that it might not be so applicable in the case of a newly started work, where it might be uncertain whether it would be continued for the period of a year. The verdict being for the defendant, a new trial was moved for, on the ground that the trial judge had refused the request of the plaintiff to charge the jury that an indefinite hiring was, as a general rule of law, a yearly hiring.

Creswell, J., said: "Then, that ground failing, the rule of law was referred to in the second instance, namely, that a general hiring,—or to use more correct terms, a hiring for an indefinite period,—is to be taken as a yearly hiring. But what is the evidence of the hiring in this case? There is nothing to show that it was an indefinite hiring. The progressive increase of salary would apply as well to the second as to the first year."

Tindal, J., said: "Upon the first ground on which the present motion was made, namely, that the jury ought to have been directed, as upon a general rule of law, that the hiring in this case must be taken to have been by the year, it appears to me that the principle on which contracts of this nature,

(*a*) *Williams* v. *Byrne* (1837), 7 A. & E. 177 (p. 182). The American rule is the same. In *Tatterson* v *Suffolk Mfg. Co.* (1870), 106 Mass. 56, the principle was recognized that the duration of a general hiring was "an inference of fact to be drawn only by the jury." In a New York case it has been held that a finding by a referee that the parties intended a yearly hiring by a continuance of the service after the expiration of the original term will, for the purpose of upholding the judgment, be regarded as a finding of fact, although it is form classified as a finding of law: *Adams* v. *Fitzpatrick* (1891), 125 N.Y. 124.

(*b*) (1844) 6 M. & G. 935.

which have been entered into without any definite arrangement as to time, are held to be contracts for a year, is by no means an inflexible rule, (*a*) but that it is a presumption to be raised from contracts of the same kind ; and that the judge at a trial is not authorized to lay down any general rule upon the subject. There are cases in which undoubtedly a rule of law is laid down to the jury. Thus, in the case of a deed, the instruction being under seal, imports the existence of a valid consideration. So, a promissory note or a bill of exchange also imports a consideration. These are rules of law ; and upon these points the judge does not ask the opinion of the jury. So twenty years' adverse possession (without reference to the late statute) will import a right of possession. That also is a rule of law, upon which the opinion of the jury would not be asked."

Creswell, J., remarked that in some of the earlier cases upon the questions of settlement, Lord Kenyon directed the justices at sessions in stating a case themselves to draw the conclusion of a hiring, but said that he "must have meant a conclusion of fact, not of law—as to whether or not there had been a yearly hiring."

A passage to the same effect from the opinion of Erskine J. will be found quoted in sec. 8, *post*.

The same conception is evidently implied by the language used in the cases already cited and those to be noticed below, especially those (cited in sec. 11, *post*) which recognize the principle that the presumption of an annual hiring is rebuttable by evidence of a custom permitting the engagement to be put an end to by notice.

6. General hiring not within Statute of Frauds—Since the contract to serve for a year under a general hiring is implied from the circumstances and not expressed, a writing is not necessary to authenticate it. (*b*)

II. PARTICULAR CIRCUMSTANCES RELIED UPON TO REBUT OR CORROBORATE PRESUMPTION AS TO A GENERAL HIRING.

7. Inference where the evidence is merely that services were rendered—It has been laid down, as a general principle, that, where there is not a hiring in express words, but the nature of the service implies a precedent hiring, the court will go

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(*a*) This expression was repeated by Pollock, C.B., in *Fairman* v. *Oakford* (1860), 5 H. & N. 635 (see the passage quoted in sec. 9, *post*).

(*b*) *Beeston* v. *Collyer* (1827), 4 Bing. 309. Compare the American rulings to the effect that the yearly hiring which is inferred from a continuance of service after the conclusion of the first year is not within the statute: *Lines* v. *Superintendents* (1885), 58 Mich. 503; *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57.

far to presume one. (*a*) Thus service for a year by a servant in husbandry has been held to afford very strong presumptive evidence of a hiring for a year. (*b*)

But the inference of a yearly hiring cannot properly be drawn from a mere rendition of services, unless it appears that the person who rendered them did so in the capacity of a servant. Thus the relation of master and servant under such a hiring cannot be inferred merely from evidence which shows that one person, when a young boy, had lived with another upon charity, and run errands, etc., (*c*), nor from evidence that a person who, after having lived with his uncle on charity, hired himself out to another person as a yearly servant, and then accepted an invitation from his uncle to come "and live with him as before." (*d*)

8. Defeasibility of contract at the will of the parties, effect of.—A contract which, by its express terms, permits either party to terminate the engagement at any time cannot be construed as one which is binding for a year. (*e*) But the presumption that a general hiring is for a year is not repelled by the mere fact that the servant left in the middle of the year (*f*); nor by the fact that the master has reserved a right to discharge the servant by giving notice (*g*), or a right to dismiss him "if he should have a sale" of the property on which the work is to be done (*h*), nor by the fact

(*a*) *Trinity* v. *St. Peters* (1764) 1 W. Bl. 443.

(*b*) *Rex* v. *Lyth* (1793), 5 T. R. 327.

(*c*) *Rex* v. *Weyhill* (1760), 1 W. Bl. 205.

(*d*) *Rex* v. *Stokesley* (1796) 6 T. R. 757.

(*e*) *Rex* v. *Great Bowden* (1827) 7 B. & C. 249: There is merely a service at will where a boy is employed to work "for meat, drink and clothes as long as he has a mind to stop:" *Rex* v. *Christ's Parish* (1824) 3 B. & C. 459. In a settlement case it has been held that the presumption that an indefinite hiring is for the year is not repelled by the fact that the master and servant thought they could separate within the year: *Rex.* v. *Stockbridge* (1773) Burr. S.C. 759. Compare *Rex.* v. *Seaton* (1784) Cald. 440, and *Rex.* v. *Newton Toney* (1788) 2 T. R. 453. But this doctrine seems to have been formulated with special reference to the English Poor Law. It is apprehended that, where the question is merely as to the rights of the parties *inter se*, their mutual understanding that the contract might be rescinded during the year would preclude the inference of a yearly hiring.

(*f*) *Rex.* v. *Worfield* (1793) 5 T. R. 506.

(*g*) *Rex* v. *Sandhurst* (1827) 7 B. & C. 557, *Rex* v. *Birdbroke* (1791), 4 T. R. 245; *Rex* v. *Hampreston* (1793) 5 T.R. 205.

(*h*) *Rex* v. *Farleigh Wallop* (1830) 1 B. & Ad. 340.

that the contract is subject to a condition subsequent, which may possibly terminate the service before the end of the year, as where the continuance of the engagement is dependent upon the servant's being found to have sufficient physical strength for the work. (*a*)

As to the cases in which the presumption of a yearly hiring exists, but its effect is, for practical purposes, overcome by evidence of a custom which gives the parties a right to sever their relations by giving notice. (See sec. 11, *post*).

9. Inferences from stipulations as to manner in which the Compensation is to be Paid—(*a*) *Provisions for payment by the piece, effect of*—There seems to be no dispute as to the doctrine that a general hiring to do piece work is not a yearly hiring. (*b*) Thus a contract to serve from Michaelmas to Michaelmas and to make a certain number of bricks is not a contract for a year certain, but only to serve until a particular job is done. (*c*)

On the other hand, since the mere fact that the amount of wages due is computed with reference to the quantity of work actually done is immaterial where the question is merely whether the hiring is or is not for a specific period, (*d*) a general hiring will be regarded as a yearly hiring irrespective of the question whether the servant is paid by the year or according to the actual results produced by his services (*e*).

There is no evidence of a hiring for a year where it appears that payments were made to the plaintiff as assistant to a surgeon, but not according to any yearly amount, nor at any definite periods, that the parties separated at the middle of the year, and that the plaintiff was not required to return and complete the service. (*f*)

(*b*) *Stipulations as to an annual rate of compensation, effect of.*—As is plainly apparent the authorities cited in subd. I., *ante*, it cannot be contended that the mention of a lump

(*a*) *Rex* v. *Northwold* (1823) 2 D. & R. 792.

(*b*) *Trimby* v. *St. Peters* (1764), 1 W. Bl. 443.

(*c*) *Rex* v. *Woodhurst* (1818), 1 B. & Ald. 325.

(*d*) See *Gregson* v. *Watson* (1876), 34 L.T.N.S. 143; *Warburton* v. *Heyworth* (1880), L. R. 6 Q. B. 1.

(*e*) *Inter King's Norton and Campden* (1850), 2 Strange 1139.

(*f*) *Bayley* v. *Rimmell* (1836), 1 M. & W. 506.

sum as the compensation to be received for the year's services could have any effect except to corroborate the usual inference as to the duration of a general hiring. In one case, however, it was argued that a different principle was applicable where the evidence was that the servant was to be paid "at the rate of £80 a year." But the Court refused to accept this theory, and said that the ordinary presumption must still prevail. (*a*)

(*c*) *Stipulations as to payment at intervals shorter than a year.*—Provisions for the payment of the compensation at shorter intervals than a year, either specify both the annual rate and the rate for the fraction of a year, or else the latter rate only.

As regards provisions of the first description, they are certainly not inconsistent with the hypothesis of a yearly hiring. Thus it has been said that, "if there be anything in the contract to show that the hiring was intended to be for a year, there a reservation of weekly wages will not control the hiring." (*b*) Hence the mere fact that an author is to furnish so much matter for a magazine every week at a certain rate does not make his engagement a weekly one. (*c*) So where there is no change in the nature of the employment, the mere fact that the salary, after having been for some time paid quarterly, is paid monthly, is not in itself evidence that the hiring has ceased to be a yearly one. Such an alteration is not unlikely to be made merely for the convenience of the servant, and has no bearing upon the essential character of the hiring. (*d*)

In *Davis* v. *Marshall* (*e*) the plaintiff was hired to manage a shop and keep accounts at a certain annual salary, payable monthly, the Court declined to accept the contention that a verdict in his favour based on the theory that the hiring was

(*a*) *Turner* v. *Robinson* (1833), 2 N. & M 829.

(*b*) *Rex.* v. *Newton Toney* (1788) 2 T. R. 453, per Buller, J.

(*c*) *Stiff* v. *Cassell* (1856) 2 Jur. N. S. 348.

(*d*) *Beeston* v. *Collyer* (1827), 4 Bing. 309; 12 Moore, 552. See further, as cases recognizing the principle that the period at which the wages are to be paid is immaterial, where the hiring is otherwise presumptively for a year: *Rex.* v. *Seaton* (1784) Cald. 440; *Levy* v. *Electrical Wonder Co.* (1893) 9 Times L R. 495; *Fawcett* v. *Cash* (1834) 3 N. & M. 177; 5 B & Ad 904. per Patterson, J., (p. 179), during argument of counsel; *Tatterson* v. *Suffolk Mfg. Co.* (1870) 106 Mass. 57.

(*e*) (1861) 4 L.T.N.S. 216.

for the year should be set aside on the ground that the monthly payments required the inference that the hiring was by the month, and could therefore be terminated at a month's notice. Pollock, C.B., said:

"No doubt the general rule is that notice need not be more extensive than the period of hiring; the question whether or not a hiring at so much a year, with monthly payments, is a yearly contract, depends a good deal on the nature of the employment, and the other circumstances of the case. Short periodical payments are absolutely necessary to persons in the position of life of the plaintiff, and the mere fact of his receiving his wages monthly is not inconsistent with a yearly hiring. He was hired at £30 a year, to be paid monthly, because, I take it, it was a convenient and necessary course to adopt."

Martin, B., said more briefly:

"A contract for a year, with monthly payments, is still a yearly contract, unless the yearly hiring be rebutted by evidence to the contrary."

The rule as to provisions of the second description is equally well settled.

"If the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring." (*a*)

"If nothing be said as to the term of service but that the servant shall have weekly pay, it must prima facie be understood that the parties intended a weekly hiring and service." (*b*)

"An indefinite hiring has been held to be for a year; but if any other facts appear, such as payment by the week, the presumption of a yearly hiring may be rebutted." (*c*)

(*a*) *Rex* v. *Newton Toney* (1788), 2 T. R. 453, per Buller, J.

(*b*) *Rex* v. *Pucklechurch* (1804), 5 East. 382; *Rex* v. *St. Andrew* (1828), 8 B. & C. 679, per Bayley, J.

(*c*) *Baxter* v. *Nurse* (1844) 6 M. & G. 935, per Creswell, J. (p. 941). The ordinary inference from such a provision is not rebutted by the fact that the hiring was to be for "winter and summer": "*Rex* v. *Dedham* (1769) Burr. S.C. 653; nor by a provision that, during the harvest, the wages are to be raised to a higher sum per week: *Rex* v. *Dodderhill* (1814) 3 M. & S. 243. In *Rex* v. *Lambeth* (1815) 4 M. & S. 315, counsel argued that where the hiring was at weekly wages and a lump sum "for the harvest," it was a weekly hiring, as the words "for the harvest" imported a consolidated period longer than a week, but the court said that it was a weekly hiring, with a special provision in case the service should last through the harvest. A hiring at so much a week for as long a time as the master and servant can agree is a weekly hiring, being a hiring for as long as they can agree from week to week: *Rex* v. *Mitcham* (1810) 12 East 351. A hiring "at two guineas a week for the first year" is a hiring by the week and not by the year: *Robertson* v. *Jenner* (1867) 15 L. T. N. S. 514, per Bramwell, B. A. entered the service of Messrs. Roe under a written memorandum, as follows: "April 13th, 1871. I agree to accept the situation as foreman of the works of Messrs. Roe, flock and shoddy manufacturers, and to do all that lays in my power to serve them faithfully, and promote the welfare of the firm, on my receiving a salary of 2*l.* per week and house to live in, from the 19th of April, 1871:"—*Held*, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract showing that a hiring for a year was intended, was not admissible for the purpose of bringing the agreement under the Statute of Frauds: *Evans* v. *Roe* (1872) L.R. 7 C.P. 138.

The inference of a weekly hiring may sometimes be strengthened by proof of something said or done by the employer at the time he was negotiating with the servant, indicating that he preferred not to enter into a more permanent contract, as where he asked the person who was about to enter his service what wages he expected per week, and upon the latter's replying £20 a year, the employer refused to give him that, but offered a certain weekly sum. (*a*)

Conversely the inference that would otherwise be drawn from the payment of the compensation weekly may be rebutted by some other provision of the contract, going to show that the parties contemplated a longer duration than a week. Thus in one case Coleridge, C.J., considered that the appointment of a manager of a company at so much per week was an annual one, for the special reason that a portion of his salary was to be a percentage of the profits, as ascertained by the auditor. (*b*)

The inference of a weekly hiring would seem to be less cogent where no evidence is given as to what transpired between the parties before the service began, and it is merely shown that some services were performed, and that for a certain period the servant was paid his wages every week. Such evidence is regarded as equally consistent with the theory of a weekly or of a yearly hiring, and presents an open question for the jury. Thus in *Baxter* v. *Nurse*, (*c*) already noticed: (see sec. 5, *ante*.)

Erskine, J., said: "Assuming that the general rule of presumption, arising from an indefinite hiring, might apply to such a case as the present, and that, if a general hiring had been proved, the jury ought to have been told that it should be taken to be a yearly hiring, still it is enough to say that a general hiring was not proved in this case. The facts in evidence clearly do not amount to such proof. It appears that the plaintiff was paid three guineas a week, with a prospect of increase of salary, and there is the fact of some

(*a*) *Rex* v. *Warminster* (1826), 6 B. & C. 77; 9 D. & R. 70.

(*b*) *Levy* v. *Electrical Wonder Co.* (1893), 9 Times L. Rep. 495.

(*c*) (1844) 6 M. & G. 935. In *Rettinger* v. *McDougall* (1860) 9 U.C.C.P. 485, the court refused to disturb the verdict of a jury who found that, where the employer of a foreman of a printing office was shown to have settled the wages weekly, the hiring was by the week, but intimated that a finding that it was yearly would also have been justified by the evidence.

service having been performed, but there is nothing to show what passed between the time of the engagement. The terms of the hiring were therefore a question for the jury, and, I think, the circumstances of its being a new periodical, of which the plaintiff was to have the management, was worthy of attention in considering the probability of a yearly engagement having been entered into without reference to such a publication, whatever might be the usage in the case of an old-established work. It seems to me, therefore, that the whole question was properly left to the jury."

The fact that a general hiring at so much for a specified part of the year is determinable by a notice of the same period is, of course, not inconsistent with the hypothesis of a weekly hiring. (*a*) But where a contract, indefinite as to duration, provides that it may be terminated by a notice of some period longer than that with reference to which the payments of compensation are estimated, the presumption of a weekly hiring which might otherwise be drawn from the mention of the shorter periods is rebutted, and the contract regarded as binding for a year. (*b*) Such a contract is one of which no certain portion of time can be predicated for its duration, and is consequently a general "hiring." (*c*)

This inference, however, from the fact that the period for notice is longer than that with reference to which the payments of compensation are computed, seems not to be an absolutely necessary one. Such at least is the apparent effect of the refusal of the Court to set aside a finding by a trial judge that the hiring of a factory hand, under an agreement which contemplated that, according to the custom of the establishment, he should receive on a certain day wages depending on the amount of work done during the previous week, was a hiring by the week, although it also appeared that the servant could not leave without a fortnight's notice. (*d*)

(*a*) *Rex* v. *Hanbury* (1802), 2 East 423, distinguishing *Rex* v. *Hampreston*, cited in the next note.

(*b*) *Rex* v. *St. Andrews* (1828), 8 B. & C. 679, [weekly payments—provision for month's notice] ; *Rex* v. *Hampreston* (1793), 5 T.R. 205 [same provisions] ; compare *Reg.* v. *Pilkington* (1844), 5 Q.B. 662 [weekly wages—service terminable by fortnight's notice].

(*c*) *Rex* v. *Great Yarmouth* (1816), 5 M. & S. 114.

(*d*) *Gregson* v. *Watson* (1876), 34 L.T.N.S. 143. The Court remarked that "the time required for notice does not necessarily fix the period of service."

9. Inferences from special incidents of the business in which the servant is employed—In one class of cases under this head the essential factor is that the parties presumably intended to refer the duration of the engagement, not to the divisions of the calendar, but to some event which would recur at irregular intervals as long as the employment lasted.

In *Creen* v. *Wright* (*a*) a master mariner accepted the command of a ship under a written agreement running as follows: "I hereby accept the command of the ship City Camp, on the following terms: salary to be at and after the rate of 180*l.* sterling per annum. Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses traveling home. Wages to begin when captain joins the ship." While in England, he was dismissed without notice, and in an action for wrongful discharge, the lower court directed a verdict for the defendant on the ground that, as the contract was specific, and there was no evidence of a custom, as in the case of clerks and servants, the plaintiff was not entitled to any notice. In the Common Pleas Division the questions discussed were these: (1) What was the primâ facie duration of an indefinite hiring of a shipmaster? (2) Was the engagement under general common law principles terminable by notice? (3) What were the plaintiff's rights as to notice under the actual provisions of the contract? In its decision of the first of these questions, (the others will be referred to below; see sec. 10) the court apparently intends to adopt the view of one of the counsel who had argued that the case of a master of a ship was an exceptional one, as it would be extremely inconvenient if the service were to determine in the middle of a voyage, and therefore it could not be intended to be a service for a year: Coleridge, C. J., said: "The relation of the master of a ship to his employer, the ship owner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making the hiring for a year, or for any other definite time, nor the notice by which the service is to be determined certain." The following dictum of Pollock, C.B., in *Fairman* v. *Oakford* (*b*), was quoted as embodying a correct principle: "There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend on its own circumstances. From much experience of juries I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice."

In yet another class of cases the circumstance which tends to rebut the presumption of a yearly hiring is that the enterprise for which the servant is engaged is so essentially lacking in the elements of stability and permanence, that the

(*a*) (1876) 1 C.P.D. 591.
(*b*) (1860) 5 H. & N. 635; 29 L.J. Ex. 429.

servant must be supposed to have contracted with reference to the possibility of losing the position before the end of a year. Thus there is no presumption that an editor employed to conduct a new periodical, started as a mere speculation, is hired for a whole year. Thus in *Baxter* v. *Nurse* (*a*), we find Coltman, J., making the following remarks:

"There is also another circumstance which contends to throw doubt upon the supposition that there was a yearly hiring, namely, that the defendant said, if the work were not conducted to his satisfaction, he should give it up. In such a state of things it is not very probable that he should hire persons to be concerned in the management of the publication for a whole year. There is, therefore, in my opinion, no presumption of a yearly hiring, and I do not see that the jury have come to an unreasonable conclusion on the subject."

This would also appear to be the rationale of the decision of the Ontario Court of Appeal in *Bain* v. *Anderson* (*b*), so far as it embodies any general principle, the judgment of the lower Court being reversed on the ground that the evidence failed to show any definite hiring in the case of one who, after the business of his employer had been sold, was retained by the purchaser in his former position of superintendent while the business was being reorganized. But the precise grounds of the decision are not stated in the report.

The presumption that the hiring was for a year certain may also be rebutted, where the duties to be discharged are such that the employé is fit for his position only so long as his political opinions continue to be the same as those of his employer. It was ruled by Lord Coleridge in the nisi prius case of *Lowe* v. *Walter*, (*c*) that a contract employing a foreign correspondent was a mere engagement at a yearly salary unless custom could be imported into it. The learned Chief Justice pointed out that, under any other theory of the relation, an editor might be placed in the anomalous predicament of being obliged to permit his newspaper to be made a medium for the publication of views of which he disapproved.

(*a*) (1844), 6 M. & G. 935.
(*b*) (1896), 27 Ont. Rep. 369.
(*c*) (1892), Times L.R. 358.

The force of this consideration is undeniable, but it seems to be extremely doubtful whether a peremptory direction was warrantable. The authorities cited in this and the preceding sections point very strongly to the conclusion that the trial judge, under such circumstances, should go no further than to declare that the peculiar nature of the work to be done was a fact tending to rebut the presumption of a yearly hiring, and that the duration of the hiring accordingly became a question to be decided by the jury upon the whole evidence. There seems to be no precedent for taking the decision out of the hands of the jury in cases of the type discussed in this article, except where the court directs a verdict for the plaintiff on the ground that there is no evidence tending to rebut the ordinary presumption that a general hiring is for a year. (*a*)

In a nisi prius case Wightman, J., ruled that, on a contract to pay a traveller by commission, no implication arises of a yearly hiring. (*b*) The principle to which the ruling is referable is not stated in the report, but it would seem to belong to the same category as those just cited.

III. Termination of the Hiring by Notice.

10. Reasonable Notice must always be given—All the cases bearing upon the second main branch of our inquiry, lay it down, or assume as an undoubted general principle that, whether the general hiring is for a year certain or subject to rescission during a current year, the party who desires to terminate the engagement is bound to give the other reasonable notice of his intention, to the end that the interests of each may suffer as little as may be by the severance of the connection. This principle, among others, we find emphatically affirmed in *Beeston* v. *Collyer* (*c*) (for the facts see section 4, *aute*), where Best, C.J., said in the course of his opinion;

(*a*) See, for example, *Buckingham* v. *Surrey, &c., Canal Co.* (1882), 46 L.T.N.S. 885, as stated in section 4, *ante.*

(*b*) *Nayler* v. *Yearsley* (1860) 2 F. & F. 41.

(*c*) (1827), 4 Bing. 309. To the same effect see *Williams* v. *Byrne* (1837), 7 Ad. & E. 177; 2 N. & P. 139. (Per Patteson, J.). *Bain* v. *Anderson* (1896), 27 Ont. Rep. 369, may be also cited as an example of that class of cases in which a judge is able to say that, whether the evidence establishes a yearly hiring or not, the plaintiff is entitled to recover damages on the ground that adequate notice was not given.

"It is not necessary for us now to decide, whether six months, three months, or any notice, be requisite to put an end to such a contract, because under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. The defendant put an end to this engagement, without assigning any reason, and the iury, therefore, were warranted in the finding they have come to."

Whether the notice in the case of a contract construed to be one for a year certain should be longer or shorter than the notice in the case of one terminable within the year, is a question which seems never to have been discussed. The courts have contented themselves with laying it down that what is a reasonable notice is necessarily a matter for the jury to settle upon the whole evidence, subject to the direction and control of the Court. Some illustrative cases bearing on this point are cited in the subjoined note. (*a*)

A very eminent judge has laid it down that "the general rule is that notice need not be more extensive than the period of payment." (*b*) But it is evident from the context of the opinion in which this dictum is found that he simply meant that a jury would be justified in finding that such a period was reasonable. (*c*)

Where a specific contract of hiring, which appears upon the whole evidence not to be one for a year, makes special provision for termination of the engagement in one particular event, the inference is that the general rule which requires a reasonable notice is to govern the rights of the parties if the contract is rescinded under any other circum-

(*a*) In *Levy* v. *Electrical Wonder Co.* (1893), 9 Times L.R. 495, Lord Coleridge ruled that a notice of one week was not sufficient in the case of a manager of a company, and left it to the jury to say what was a reasonable notice. In *Hiscox* v. *Batchelor* (1867), 15 L.T.N.S. 543, the jury found that an advertising and canvassing agent was entitled to a month's notice. In *Byrne* v. *Schott* (1883), Cab. & E. 17, a manager of several shops belonging to the defendant, was found by a jury entitled to a month's notice. In *Vibert* v. *Eastern Tel. Co.* (1883), 1 Cab. & E. 17, where the terms of the hiring were indefinite, and the plaintiff's salary was paid at first monthly and afterwards weekly at a certain annual rate, a stationery clerk in a telegraph office was found by the jury to be entitled to one months' notice upon being discharged in the middle of a current year.

(*b*) *Davis* v. *Marshall* (1861), 4 L.T.N.S. 216, per Pollock, C.B.

(*c*) *Robertson* v. *Jenner* (1867), 15 L.T.N.S. 514, at nisi prius, the fact that the hiring was by the week, was held to justify the inference that a week's notice was sufficient. (Per Bramwell, B.).

stances than those provided for. Thus with respect to the second and third of the three points decided in *Creen* v. *Wright* (*a*), the incidents of which have already been stated (sec. 9 *ante*), the Court said:

"As to the notice, we think the sound construction of the contract before us is that, except, in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the ship owner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be inflicted on the ship-owner, without any remedy, by such a construction of the contract, if acted on by the master, leads us to believe that such is not and could not be the meaning of the contract, nor the intention of the parties to it. The loss and inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed; and this consideration points to the same conclusion." The maxim, Expressio unius est exclusio alterius, was also applied to the construction of the contract, and shown to corroborate the inference thus drawn.

As regards the implied duration of the relations of the parties to a contract of general hiring and the right to terminate those relations, the action for use and occupation bears, up to a certain point, a rather close analogy to an action upon a contract of general hiring. But that it is only an analogy appears very clearly from the following passage of Chief Justice Best's opinion in *Beeston* v. *Collyer*. (*b*)

"The principles upon which the action for use and occupation proceed are the same as those which formed the ground of my direction to the jury upon the present occasion. The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is, that it can only be terminated by a half year's notice concluding with that day on which the tenancy commenced. We do not say that such terms are to be engrafted on contracts for the hiring of servants."

11. General Hiring, primâ facie terminable only at the end of the current year—The main principle which makes a general hiring presumptively a yearly, clearly involves the corollary that in the absence of some positive evidence showing that the right to terminate the engagement at some other time was under-

(*a*) (1876) 1 C.P.D.
(*b*) (1827) 4 Bing., 309.

stood by the parties to be an incident of the contract, the notice must, if given at all, be given so as to mature at the close of the current year.

Thus the effect of a clause requiring three months' notice on each side to determine a contract which, from its other provisions, appears to be for a year certain, is that the three months' notice must be given so as to mature at the end of the year. (*a*)

So a plea based on the theory that a notice is reasonable which determines the service before the end of a current year is no answer to a declaration which alleges the contract to be for one year from a certain date, and so on from year to year, to the end of each year commenced while the plaintiff should be so employed, reckoning each year to commence at the day named. (*b*)

(*a*) *Forgan* v. *Burke* (1861), 12 Ir. C.L. 495.

(*b*) In *Williams* v. *Byrne* (1837), 7 A. & E., 177. This case was evidently not present to the mind of Lord Coleridge when, in *Lowe* v. *Walter* (1892) 8 Times L.R. 358, he remarked (p. 359), that, as to the contention that the notice must expire at the end of the current year, no doubt that right existed, and there were very good reasons for it, as to yearly tenants of land; but that he was not aware that the same law existed as to servants. (See also p. 361). The Irish case last cited was called to his attention by counsel, but declared, without any reasons being assigned, not to be in point.

Other cases bearing upon the rule laid down in the text are the following:

Davis v. *Marshall* (1861), 9 W.R. 520; 4 L.T.N.S. 216, where a verdict was allowed to stand by which a clerk was permitted to recover, on the ground that he had been dismissed without notice, an amount exceeding the wages for the residue of the year.

Foxall v. *International, etc., Co.* (1867), 16 L.T.N.S. 637. Byles, J., in the course of his charge to the jury said: "Take the case of a clerk, a clerk in some very responsible position, who is employed at a salary of, say, £2,000 a year, is he to be dismissed, without any custom or agreement, at a quarter's notice? I do not decide it as a question of law; but I express an opinion of fact that the clerk could not be dismissed at such a notice; he would be entitled to his salary up to the end of the year."

Buckingham v. Surrey, etc., Canal Co. (1882) 46 L. T. N. S. 885. There the plaintiff was appointed consulting engineer to the defendant company under a resolution to the following effect: "Resolved that Mr. J. B. be appointed engineer to the company at a salary of £500 per annum." The Court held that, as no evidence was offered on behalf of the defendant of any custom to determine such a contract by notice, the trial judge was bound to direct the jury that the hiring was for a year certain. A motion for a new trial was therefore denied.

The more general principle that a hiring for a specific period is terminable only at the end of that period, is assumed to be the true one by Holroyd, J., in *Rex* v. *Great Yarmouth* (1816), 5 M. & S. 114 (p. 119), where the hiring was a monthly one.

12. Under what circumstances the inference that the notice must expire at the end of the current year is rebutted—(*a*) *Generally*—As already remarked (sec. 2, *ante*), the scope of an inquiry into the duration of a general hiring is not the same as the scope of an inquiry into the rights of the parties to terminate the relation. It is obvious, however, that the same evidence which goes to show that such a hiring was not for a year tends to establish the conclusion that the notice by which it is terminated need not mature at the end of the current year. In other words, once it is shown that the contract is only binding for some fraction of a year, the duty of the parties in regard to notice is defined by considering what shall be deemed reasonable notice, or what notice they are entitled to by virtue of a custom in the business. It will be unnecessary, therefore, in the present connection, to discuss at any length the cases in which the right to terminate by notice a hiring indefinite as to time is deduced from considerations identical with those which are deemed to rebut the presumption that the hiring was yearly.

Where a clerk hired at an annual salary accepts, on quitting the service, a month's salary in lieu of notice, and subsequently takes service again under the same employer on terms which such employer testifies to have been the same except as to salary, the jury is warranted in finding that the hiring is determinable at a month's notice. (*a*)

(*b*) *Custom as a circumstance tending to rebut the inference.*—That the existence of a custom with reference to which the employer and employed may be presumed to have contracted will furnish a sufficient ground for a reading into a contract of general hiring an implied stipulation that either party may terminate it by notice is obvious upon general principles. (*b*)

(*a*) *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

(*b*) See generally the opinion of Grove, J., in *Buckingham* v. *Surrey Canal Co.* (1882) 46 L.T. N.S. 885. When, however, the hiring is expressly for a term "certain" a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract, etc: *Peters* v. *Stavely* (1866), 15 L.T. N.S. 275.

One eminent judge has gone to the length of declaring that the absence of evidence of a right under custom to terminate a hiring by notice maturing at some other time than the end of the year is, without more, sufficient to require the conclusion that the hiring was for a year certain. (*a*) But this is clearly putting the case too strongly, for the presumption of a yearly hiring is, as we have seen above, rebuttable by other evidence besides that of a custom. Such a doctrine can be true, to the extent here declared, only in regard to employments to which, for some reason, the presumption of a yearly hiring does not apply. An example of such a case is furnished by *Holcroft* v. *Barber* (*b*) where Wightman, J., in an action for wrongful dismissal brought by one who alleged himself to be the editor of a newspaper, ruled that he might introduce testimony going to show that there was a custom for editors to be engaged for a year, unless there was an express stipulation to the contrary. But the jury found for the defendant on the ground that the plaintiff was not an editor. See, however, as to this case, sec. 4, *ante*.

Evidence of custom will not avail to disturb the general presumption that the hiring is for a year certain, unless it relates to "a general custom, of some reasonable antiquity, uniform, and sufficiently notorious and well understood that people would make their contracts on the supposition that it exists." (*c*)

The effect of a custom that a general hiring of a clerk in a given city, although it is a yearly hiring, may be terminated by a month's notice, is not overcome by a provision in the contract that the employers will make the clerk a donation at the end of the year, if he has done sufficient business to justify them in doing so. Such a provision clearly has no bearing upon the extent of the master's right to dismiss the servant. (*d*)

(*a*) Rule so laid down by Littledale, J., in *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904.
(*b*) (1843), 1 C. & K. 4.
(*c*) *Foxall* v. *International, etc., Co.* (1867), 16 L.T.N.S. 637, per Byles, J.
(*d*) *Parker* v. *Ibbetson* (1858), 4 C.B.N.S. 346.

The result of connecting the general principle as to the effect of a custom with the rule of pleading that the proof of a contract subject to a certain qualification does not support a count which does not state such a qualification is that an indefinite hiring which by the custom of the business, is terminable by a three months' notice, cannot be declared upon as a contract to continue the servant in the employment for an entire year. (*a*)

Whether the existence of a custom fixing the period of notice has been established is a question for the jury (*b*), subject, of course, to the power of the court to declare the testimony offered to be insufficient to support the conclusion that there is such a custom. (*c*) Hence where the question is whether the editor of a new periodical can be dismissed before the end of the current year, and the evidence of the plaintiff's witnesses goes only to the extent of showing that usage had made such a hiring annual in the case of established periodicals, it is properly left to the jury to say whether such a usage is applicable to a periodical like that for the management of which the editor was hired. In *Baxter* v. *Nurse*, (*d*) Cresswell J., in commenting on a contention of the plaintiff that by usage, a contract for the employment of an editor was a contract for a year, said:

"It cannot be contended that this was not a question for the jury. And it was certainly a fair observation by counsel, that all the instances that were proved had reference to the old and established works. In cases where a general rule with regard to questions of hiring has been established, it has been in conformity with some established usage to be gathered from evidence. That it is not a fixed rule, is clearly shown from the course taken at trials where the question as to the nature of a hiring arises—where evidence is always given by persons in the particular trade, or under circumstances similar to

(*a*) *Metzner* v. *Bolton* (1854), 9 Exch. 518. [The trial judge had ruled that the power to determine the contract, as it came by way of defeasance need not be noticed by the plaintiff]. See the remarks of Martin B. on this case in *Wheeler* v. *Bavidge* (1854), 9 Exch. 668.

(*b*) *Foxall* v. *International, etc., Co* (1867), 16 L. T. N. S 637. *Parker* v. *Ibbetson* (1858) 4 C.B.N.S. 346; *Lowe* v. *Walter* (1892) 8 Times L.R. 358.

(*c*) In *Naylor* v. *Yearsley* (1860) 2 F. & F. 41, the plaintiff called a witness to prove that it was customary to employ agents to canvas for advertisements, to be paid by a percentage on the advertisements received whenever they were actually inserted, and that it was considered that they were entitled to a month's notice; but Wightman, J., held such evidence not sufficient.

(*d*) (1844) 6 M. & G. 934.

those of the parties in the case; and then the jury are told that, unless there is something to distinguish the case before them from the usage that has been proved, the parties must be considered as dealing with reference to such usage. But the finding by the jury in such a case, in conformity with such general usage, cannot be considered as a rule of law."

But, as a custom, when proved, becomes part and parcel of a contract, and the question whether the terms of a written agreement may admit or must necessarily exclude a custom is one of law for the court, a jury exceeds its powers in finding that a custom which allows dismissal at six months' notice is excluded by a special provision in such an agreement which is not inconsistent with the application of that custom. (*a*)

—(*c*) *Custom in the case of domestic servants.*—The general principle as to the effect of a custom in qualifying the primâ facie meaning of a contract of general hiring is most frequently illustrated in the cases which apply the familiar rule that menial or domestic servants are subject to discharge at a month's notice, or upon payment of a month's wages.

"In the case of domestic servants the rule is well established that the contract may be determined by a month's notice or a month's wages." (*b*)

"The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition that the servant will obey all lawful orders of the master." (*c*)

The presumption of the existence of a custom enabling the employer to terminate the service by a month's notice, does not arise except in the case of servants of this class. (*d*)

(*a*) *Parker v. Ibbetson* (1858), 4 C.B. N.S. 346.

(*b*) *Fawcett* v. *Cash* (1834) 5 B. & Ad. 904; 3 N. & M. 177, per Littledale, J.

(*c*) *Turner* v. *Mason* (1845) 14 M. & W. 112, per Parke, B. To the same effect see the following cases: *Foxall* v. *International, etc., Co.* (1867) 16 L.T.N.S. 637; *Smith* v. *Kingsford* (1836) 3 Scott, 279; *Fewings* v. *Tisdall* (1847), 1 Exch. 295; *Archard* v. *Horner* (1828) 3 C. & P. 349. If a month's wages are paid the servant is entitled only to the money due for a calendar month, not to board wages: *Gordon* v. *Potter* (1859), 1 F. & F. 644.

(*d*) *Broxham* v. *Wagstaffe* (1741), 5 Jur. 845, per Parke, B. In *Williams* v. *Byrne* (1837), 7 A. & E. 177, Littledale, J., doubted whether, even in the case of a menial servant, it could, as matter of law, be implied that there was a power to determine the service at any time on a month's notice. In *Beeston* v. *Collyer* (1827), 4 Bing. 309, the judges were much influenced by the consideration that the position of the plaintiff was such as to exempt it from the operation of the rule applicable to domestic servants: "Persons in the position of the plaintiff (a clerk to an army agent) must be supposed to possess superior acquirements, and are entitled to more respect than to be turned off without any reason being assigned." (Park, J.) "It would indeed be extraordinary if a party in his station of life could be turned off at a moment's notice, like a cook or scullion." (Best, C.J.).

In many of the decisions, therefore, the real question at issue has been whether the plaintiff belonged to the category of menial servants or not. The following have been held to be menial or domestic servants: A man hired to keep a garden in order, to work in the stables, and make himself generally useful (*a*); a head gardener (*b*); a huntsman hired at a salary of £100 a year and perquisites. (*c*)

Conversly the usage as to the termination of the hiring by a month's notice or a month's wages has been deemed not to be applicable to a governess (*d*), nor to the housekeeper of a large hotel of the modern type, her position being essentially different from that held by a housekeeper in a private family. (*e*)

13. Termination by Notice under Specific Contracts—An obvious exception to the rule that a general hiring can be terminated only at the end of a current year presents itself where the parties have expressly provided for its termination by notice. (*f*)

14. Inference as to duration when the employment under a General Hiring continues for more than one year—In cases in which the servant has retained for more than one year the employment upon which he entered under a general hiring, it becomes an important question how far the relations of the parties are subject to the incidents implied in the original hiring. Without undertaking to discuss this question in all its bearings, (*g*)

(*a*) *Johnson* v. *Blenkinsopp* (1840), 5 Jur. 870.

(*b*) *Nowlan* v. *Ablett* (1835), 2 Cr. M. & R. 54; 5 Tyr. 709.

(*c*) *Nicoll* v. *Greaves* (1864), 17 C. B. N. S. 27; 33 L.J.N.S.C.P. 259; 10 L. T. N.S. 531.

(*d*) *Todd* v. *Kerrich* (1852), 8 Exch. 151; 17 Jur. 119; 22 L.J. Ex. 1

(*e*) *Lawler* v. *Linden* (1876), 10 Ir. Rep. C. L. 188. In the opinion of a jury to whom Parke, B., left the question, a gentleman is not justified in giving only a month's notice to a farm bailiff: *South* v. *Drummond*, reported in the London *Times*, March 28, 1849. See Smith on Master and Servant, p. 95,

(*f*) See the remarks of Grove, J., in *Buckingham* v. *Surrey, &c., Canal Co.* (1882), 46 L.T.N.S. 885. A contract by which the employer hires a foreman of smelting works, "to remain with me for at least three years at my option," has been held to be a yearly hiring, giving the employer to determine the engagement at the end of the first, second or or third year: *Down* v. *Pinto* (1854), 9 Exch. 327.

(*g*) In *Mansfield* v. *Scott*, 1 Cl. & Fin. 319, the general doctrine was applied that, when a contract of service for one year certain, is continued during subsequent years with the assent of the employer, it is presumed to be renewed in all its parts,—in this case as to a subsidiary promise by which the servant was to receive a present at the end of the year. In a settlement case where the question was whether a pauper who had been paid wages during the first year of his service

it is sufficient to say that the great weight of authority is to the effect that the presumption of an annual engagement attaches, with other incidents, to the contract during each successive year that the parties continue their relations without making any new arrangements.

"If a master hire a servant without mention of time, that is a general hiring for a year, and if the parties go on four, five or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties." (*a*)

In *Williams* v. *Byrne* (*b*) the declaration alleged the contract to be for one year from a certain date, and so on from year to year to the end of each year commenced, while the plaintiff should be so employed, reckoning each year to commence at the day named. (*c*) Littledale, J., said: "It appears not to be disputed that the parties were, at any rate, bound to the end of the first year. I think their position was the same in all the subsequent years. Therefore, when any year had commenced, the service was to run on to the end. And this was to continue as long as the parties pleased, that is, till one of them determined the engagement by reasonable notice expiring at the end of the current year." Patterson, J., said: "It is an employment for a year, and so on from year to year, the year beginning on a day named. The words 'while the plaintiff should be so employed,' are satisfied by a power to put an end to the employment in the way warranted by the contract; that is if it be put an end to adversely and not by agreement, by a notice expiring with the current year. How long such notice must be, we need not determine."

The usual presumption is not repelled by the fact that the contract of general hiring was entered into immediately after

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under his father, was living with the latter as a child or a servant during the succeeding year, it was held that the near family relationship of the parties excluded any presumption that the incidents of the connection continued to be the same after the first year: *Rex* v. *Sow* (1817), 1 B. & Ad. 178. The following American cases also are explicit to the point that where a person is hired in the first place for a year certain, or for part of a year, and the service is continued with the tacit consent of the master, the incidents of the implied contract which thus results are the same as those to which the express contract was subject: *Grover, etc., Co.* v. *Bulkley* (1868), 48 Ill. 189; *New Hampshire, etc., Co.*, v. *Richardson* (1830), 5 N. H. 294; *Vail* v. *Jersey, etc., Co.*, (1860), 32 Barb. 564; *Wallace* v. *Devlin* (1885), 36 Hun. 275; *Huntingdon* v. *Claffin* (1868), 38 N. Y. 182; *Sines* v. *Superintendents* (1885). 58 Mich. 503; *Wallace* v. *Floyd* (1857), 29 Pa. St. 184.

(*a*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, per Best, C.J.

(*b*) (1837), 7 A. & E. 177.

(*c*) To the same effect see *Forgan* v. *Burke* (1861), 12 Ir. C. L. 495: *Adams* v. *Fitzpatrick* (1891), 125 N.Y. 124: *Tatterson* v. *Suffolk Mfg. Co.* (1870), 106 Mass. 57. In Fawcett *v.* Cash (1834), B. & Ad. 904, Taunton, J., seems to have had some doubt as to the relations of the parties during years subsequent to the first, as he remarked that it was unnecessary to consider what the effect would have been if the dismissal had taken place after the first year. But this rather nebulous and entirely negative expression of disapproval is of small importance when set against the explicit rulings cited above.

the termination of services under a special engagement for a lump sum for a period of less than a year. (*a*) But from the hiring of a shepherd a few days after a previous term had come to an end, and the payment of his wages up to the end of that term, a general hiring cannot be inferred by connecting the new period with the earlier one. (*b*)

15. Inferences where the servant leaves and re-enters an employment.—A principle resembling that discussed in the last section has been in one case applied to the prejudice of the servant, a jury being held justified in finding that the susceptibility of being terminated by a month's notice was an incident of a general hiring, where the plaintiff on leaving the same employment some time before had accepted that period of notice as sufficient. (*c*)

16. Harnwell v. Parry Sound Lumber Co., discussed—We are now in a position to examine the decision in *Harnwell* v. *Parry Sound L. Co.* (*d*) The facts of the case were as follows: The plaintiff entered into defendant's service as assistant book-keeper, under a written agreement, for a year certain, at a specified annual salary. After the close of the year he continued to fill the same position, and was paid at the same rate, but no express contract was made either as to time or compensation. When about half of the second year had elapsed, he received three months' notice of dismissal, the reason assigned for the discharge being that his services would not be required during the approaching winter. He brought an action for wrongful dismissal, and claimed damages assessed upon the theory that, after he had once entered upon the second year of the service, the contract was binding upon the employer up to the end of that year. No

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(*a*) *Rex* v. *Macclesfield* (1789) 3 T. R. 76; *Rex* v. *Long Whatton* (1793), 5 T. R. 447; *Rex* v. *Hales* (1793) 5 T. R. 668.

(*b*) *Rex* v. *Ardington* (1834) 1 Ad. & E 260. The court said it did not see how the master could have done better to avoid a yearly hiring, and that this was apparently the intention of the parties.

(*c*) *Fairman* v. *Oakford* (1860) 5 H. & N. 635.

(*d*) (1897) 24 Ont. App. 110. The other Ontario cases bearing on the effect of a hiring indefinite as to time, have already been cited in the earlier sections of this article.

evidence, so far as appears from the report, was given as to custom either in favour of the plaintiff or of the defendant, nor was any attempt made to show that the conditions under which the business was carried on might require such an employee to take into account the possibility that his services might not be required during the winter. Meredith, C.J., who tried the case without a jury, gave judgment for the plaintiff on the ground that, as he had originally been hired for a year certain, and had continued, after the expiration of the year, to perform the same duties at the same rate of salary, it might reasonably be inferred that there was a second engagement of the same duration as the first.

The Court of Appeal took a different view of the evidence, intending, as it would seem, to rest its conclusion on two distinct grounds, which, however, are scarcely differentiated with as much precision as might be desired. The first of these is that the employer's tacit acceptance of the plaintiff's services after the beginning of the second year did not, of itself, justify the inference that the renewed hiring was, like the original one, binding for an entire year. The second is that the conclusion of the trial judge could not be sustained without the aid of a presumption that a general hiring is for a year certain, and that the weight of authority is against the indulgence of any such presumption.

So far as regards the former of these grounds the rationale of the decision will be apparent from the following passage of the opinion:

"The parties go on after the expiration of their express contract, one to serve in the same employment, the other to accept the service and to pay therefor at the same rate quarterly as before. How can a contract to serve for another year absolutely be implied from this? Or can the fact that the previous hiring was expressly for one year certain help us to infer an implied contract for a similar period? These, I think, are the only relevant facts, for can there be said to be anything in the nature of the plaintiff's employment which makes it proper to infer a contract for a year absolutely? We may say that it was of such a character as to make it unreasonable that he should be dismissed without notice, but can we say more? There is no evidence of the existence of any usage in reference to such or similar engagements. . . . I am unable to bring myself to the conclusion that any of the relevant facts proved, or all of them together, justify the finding that there was a hiring for a second year absolutely."

In order to appreciate fully the length to which this conclusion goes, we have only to remember that it sets aside a finding of an ultimate fact which a trial judge, in the discharge of the same functions as a jury, considered to be a warrantable inference from the probative facts before him. It amounts, therefore, to an assertion that if the case had been tried before a jury, these probative facts would have been insufficient to sustain a verdict for the plaintiff. It is necessary, from the outset, to insist strongly upon the aspect of the decision, because much of the reasoning of the court suggests that it has failed to grasp completely the full significance and effect of the principle established by all the authorities, viz., that the functions of a reviewing tribunal are, in this class of cases, strictly limited to ascertaining whether the testimony is adequate to support the conclusion of the person or persons whose province it is to pass upon the facts. For example, in the extract just quoted the word "absolutely" is clearly out of place. The real question to be decided was simply whether a judge, sitting as a trier of the facts, was justified in finding as one of those facts, that the engagement was binding for the whole of the second year.

Regarding this as the real issue, it is difficult to see how the ruling of the Court of Appeal as to the effect of the continuance of the service after the first year can be sustained in face of the precedents cited in sec. 13, *ante*. Under the doctrine applied in those cases the evidence as stated in the judgment itself not only "helps us to infer" that the extension of the employment was impliedly for another entire year, but points almost irresistibly to that conclusion. The attempt to get rid of the authority of *Beeston* v. *Collyer* does not strike one as being altogether successful. Its circumstances, we are told, are "peculiar," but it is not explained in what essential particular the evidence differs from that in *Harnwell* v. *Parry Sound Lumber Co.* Setting aside wholly immaterial variations of facts, the latter case is on all fours with the former, except in one respect, viz., that in the English case the annual duration of the original hiring was a matter of implication, while

in that at bar the original hiring was for a year by express stipulation. But this, if a distinction at all, is a distinction which evidently makes against rather than for the view of the Court.

This special reason for doubting the correctness of the judgment is of course quite disconnected from the doctrine as to the implied duration of a general hiring. The second hiring is or is not deemed to be for a year certain, because it is a renewal of another, of which one of the incidents was that it was or was not binding for that term, and this as well as other incidents, are presumed to attach to the extended period, unless the parties make other arrangements, and not because the new hiring is indefinite as to time. We cannot help thinking that the Court might have reached a different conclusion if their attention had been more closely concentrated upon the significance of the authorities in relation to this particular aspect of the case before them.

The other position taken by the Court as to the non-existence of a presumption that a hiring for an indefinite period is one for a year certain is, we think, not less untenable than that just discussed. That this view is opposed to many of the cases is fully conceded in the judgment, the theory upon which it is defended being that the law has been modified by the more recent authorities. (*a*)

Considering the deep traces which the rule supposed to have been abandoned has left upon this branch of our law, and that it has, by implication at all events, been sanctioned by the House of Lords, (*b*) this hypothesis requires the most ample demonstration before it can be accepted. Such demonstration, it is submitted with all respect, is not obtainable.

That the views of the court on this point are erroneous is

(*a*) See p. 116 of the opinion. It is remarked that, as a general rule, wherever the question of the duration of a general hiring was expressly raised in the older cases, it was said to be "for the jury to determine upon the whole of the circumstances of the case, though they were to be told that the presumption [i.e. of a yearly hiring], existed and ought to govern in the absence of anything to repel or control it."

(*b*) *Elderton* v. *Emmens* (1853) 4 H. of L. 624, (referred to in sec. 3, *ante*). This case, strange to say, was not noticed either by counsel or court, but gives the ordinary rule the very strongest kind of support by taking its correctness for granted.

strongly suggested by the fact that there is no decision in the books disapproving in express terms of the rule alleged to be obsolete. A change in the law which is so essentially radical would scarcely, as we may reasonably suppose, have been made without some specific judicial repeal of the principles so long and so often applied. Not to insist too strongly upon this negative argument, however, we assert with confidence that the English cases may be searched in vain for any real indication that there has ever been any repeal of those principles by indirection. The utmost that can be said of the more recent cases is that certain individual judges have used language which, when detached from the facts which occasioned it, may be construed in a sense favourable to the contention of the Court of Appeal.

One of these isolated remarks is the dictum of Pollock, C.B., in *Fairman* v. *Oakford* (see the words quoted in sec. 9 *ante*). This passage, however, clearly cannot bear the meaning ascribed to it by the Court of Appeal. The first sentence is to be interpreted with due reference to the fact that the learned Chief Baron was negativing the obviously untenable doctrine of plaintiff's counsel that the presumption of a yearly hiring must prevail "in the absence of an express stipulation to the contrary." The second sentence is simply a declaration of his approval of the finding of the jury upon the question of reasonable notice in a case where the master's right to determine the hiring within a current year had already been settled upon the evidence submitted.

The words of the Chief Baron are in some sense an echo of some used in *Baxter* v. *Nurse*, another of the cases supposed by the Court of Appeal to sustain its theory. But that this decision cannot be thus vouched in aid of its doctrine will be at once apparent by referring to the statement of the facts and the extracts from the opinions in sec. 5 and 9, *ante*. It is simply a reassertion of the doctrine that the rule as regards the prima facie duration of a general hiring does not rest upon any fixed principle of law, but simply gives effect to a presumption of fact which, like other such presumptions, is rebuttable by evidence.

We confess ourselves to be quite unable to see any ground for supposing that the Common Pleas Division, when it quoted in *Creen* v. *Wright* the dictum of Chief Baron Pollock referred to previously, credited its author with the intention of burying an older doctrine, without condescending to explain when and how its demise occurred. On referring to the place where we have discussed that case, sec. 8, (c) *ante*, it will be seen that the court by which it was quoted was reviewing the ruling of a judge who had directed a verdict for the defendant for the narrow reason that, as the contract was specific, and no provision was made for notice, nor any custom proved, the plaintiff could be discharged at any time the employer pleased. Under such circumstances it was only natural that the court, in sending back the case for a new trial on the ground of misdirection, should take occasion to point out that the peculiar nature of the employment was a circumstance tending to rebut the general presumption that a hiring indefinite as to time is one for a year, and that its duration was, therefore, a matter to be settled upon the whole evidence. That there was no intention on the part of the court to treat this presumption as obsolete is conclusively shown by the fact that Lord Coleridge, who wrote the opinion, enunciated, during the argument of counsel, the ordinary rule regarding that presumption, and cited, without any hint of disapproval, a familiar authority on the subject. (*a*)

As to *Lowe* v. *Wright*, considering that this was a nisi prius case, that it came before a judge whose reputation as a jurist is not of the highest, and that both he and the counsel, as will be seen from the report, exhibit a very plentiful

(*a*) *Rex* v. *Hampreston* (1791), 5 T. R. 205. It is worthy of notice that in the report of *Fairman* v. *Oakford*. in 29 L. J. Exch. 459, the language ascribed to Pollock, C.B. is as follows: "The contention of the plaintiff's counsel was that he was entitled to a whole year's salary, or at all events to more than a month's salary. My own experience is that juries in London generally find that clerks are entitled to three months' notice, that is, they find that the hiring was in each particular case to be put an end to by three months' notice." This version is probably the more authentic of the two, as the special allusion to London can scarcely be an invention of the reporter, and, since it indicates that the learned judge was probably referring merely to trials in one particular city, where, as it happened, the rights of the parties were governed by a custom which allowed dismissal at a reasonable notice, the significance of the passage as an expression of general principles, is reduced to a minimum.

ignorance of many earlier authorities which are most pertinent to the issue, the Court of Appeal has, we venture to think, treated the rulings made during the trial with far too much respect. Whether this be so, or not, however, Lord Coleridge certainly did not intend in this case, any more than in *Creen* v. *Wright*, to treat the ordinary doctrine as obsolete, for, during the proceedings he remarked that he would tell the jury that, "as the plaintiff was engaged for a year, primâ facie, the presumption was that it was a yearly contract." The direction he finally gave was, it is true, different from this, and we have already hazarded an opinion that it was inconsistent with a proper conception of the true dividing line between the functions of the Court and jury (sec. 9, *ante*). But there is no explicit retractation of the earlier remark, which must, therefore, be regarded as embodying his abstract views on the subject.

It would seem, therefore, that even the cases cited by the Court of Appeal itself for the support of its judgment do not, upon any reasonable construction, support its theory as to a modification of the law. But the most conclusive refutation of that theory is that the very latest decision on the subject by an English court of review shows quite clearly that the presumption which it is sought to consign to the limbo of discarded doctrines is still a living force in the law of the mother country. The hypothesis that there has been a modification of that law is deprived of its last prop when, so late as 1882, we find that the course taken by a trial judge in directing a verdict for the plaintiff on the ground that there was no evidence to rebut the presumption that the hiring, being general, was for a year certain, was approved by two such distinguished jurists as Justices Grove and Matthews. (*a*) The weight of this decision from our present standpoint is greatly increased by the fact that the familiar principle established by the older authorities, which are supposed by the Court of Appeal to have been discredited, is laid down without the smallest suggestion or hint that other cases such as *Creen* v. *Wright*, had introduced a different rule.

(*a*) *Buckingham* v. *Surrey, etc., Canal Co.*, 46 L.T.N.S. 885.

It is scarcely necessary to insist at any length upon the very unsatisfactory condition in which the law of Ontario is left by a judgment which, if our view of the true effect of the English cases is correct, constitutes a wholly new departure in a matter which is of immediate practical importance to a very numerous section of the community. We cannot refrain from expressing a hope, therefore, that the whole question may before long be reopened under such circumstances that the Supreme Court will have an opportunity of stating its views upon the subject.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act).

TRUSTEE—BREACH OF TRUST—MORTGAGE OF TRUST ESTATE WITH TRUSTEE'S OWN PROPERTY—APPORTIONMENT.

Rochefoucauld v. *Boustead* (1898) 1 Ch. 550 is a somewhat curious case arising on the taking of the accounts directed by the judgment of the Court of Appeal, 1897, 1 Ch. 196 (noted ante. vol. 33, p. 384). It may be remembered that by that decision the defendant was declared to be trustee for the plaintiff of certain estates in Ceylon, which the defendant had purchased in his own name, and claimed to be entitled to for his own benefit, and an account was directed. In the course of taking the accounts it appeared that the estates in question had been mortgaged along with certain property of the defendant in Cumberland to secure £35,000 borrowed from Coutts & Co., but that Coutts & Co. had never resorted to the Ceylon estates for payment. £15,000 of the sum of £35,000 had been previously advanced, and the balance, £20,000, was advanced when the Ceylon estates were mortgaged. The official referee, to whom the taking of the account was referred, held that the defendant was chargeable with £20,000.

Kekewich, J., on appeal considered that although the defendant's mortgaging the Ceylon estates was a breach of trust, yet was of opinion that as the plaintiff had suffered no loss, and the defendant had obtained no benefit thereby, he was not chargeable with any part of the £35,000. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.), on the other hand, thought that the proper method of taking the account was to apportion the £20,000 on the Ceylon and Cumberland estates, according to their respective values, and on that basis they held that the defendant was chargeable with three-fourths of the £20,000, and the appeal from Kekewich, J., was allowed.

MORTMAIN—WILL—DISCRETION OF TRUSTEES—"GIFT TO SUCH CHARITABLE INSTITUTIONS AND OBJECTS AS MY TRUSTEES MAY DETERMINE"—IMPURE PERSONALTY—CHARITABLE USES ACT, 1735 (9 GEO. 2, C. 36.) SS. 1, 3, 4.

In re Piercy, Whitwham v. *Piercy* (1898) 1 Ch. 565, involves a question under the Mortmain Act (9 Geo. 2, c. 36), similar to that discussed in *Anderson* v. *Dougall*, 13 Gr. 164. A testator by his will had devised and bequeathed real and personal property for sale and conversion, and out of the proceeds directed his trustees to apply one-tenth of the fund to "such charitable institutions and objects as my trustees may determine." The question was whether the gift was good as regarded the impure personalty, and proceeds of sale of realty. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.), agreed with North, J., that the gift extended to the impure personalty and proceeds of realty, and conferred upon the trustees a power of selection, which could be validly exercised in favour of any object or institution exempted from the operation of the Act, (9 Geo. 2, c. 36); but that no exercise of the power of selection of an unexempted charitable institution or object would operate as a valid gift of the impure personalty and proceeds of sale of real estate. Williams, L.J., says: "It seems to me that in *Lewis* v. *Allenby*, L.R. 10 Eq. 668, it is tolerably clear that Stuart, V.C., meant to decide that a gift would not be outside the provision contained in the 1st and 3rd section of 9 Geo. 2, c. 36, unless in a case where it included the gifts avoided by

those sections; you might include gifts within those sections, unless there were words excluding that which might be so included," but it is thought better to forbear to quote any further at present, for fear of the consequences to the reader of these notes.

ACCOUNT—CONTRACT—PRICE PAYABLE IN FOREIGN CURRENCY—PERIOD OF CONVERSION INTO ENGLISH MONEY—RATE OF EXCHANGE.

Manners v. *Pearson* (1898) 1 Ch. 581, this was an action for an account. The action was brought on a contract made in 1891, whereby the defendants agreed to pay one Morrison, deceased, and of whom the plaintiff was legal personal representative, one cent in Mexican currency per cubic metre of excavation works being done in Mexico, as and when the same should be received by the defendants from the Mexican authorities. Morrison died in 1894, but the plaintiff was not appointed his administrator till May, 1896, and in the meantime there was no personal representative of his estate. The action was brought to recover sums which had become due and payable to Morrison's estate, under the contract, after his death. The defendants on 13th November, 1897, delivered an account showing a balance due to Morrison's estate of $19,366 in Mexican currency on 31st Aug., 1896, which they offered to pay in Mexican currency or its equivalent in value in English money on the 13th Nov., 1897. The plaintiff, however, claimed that the account ought to be taken on the basis of charging the defendants with the sums payable monthly, turned into English money at the respective dates on which they became payable, or at all events that the balance appearing due on 31st Aug., 1896, should on that date be turned into English money; the defendant on the other hand claimed that the ultimate balance only ought to be turned into English money. The majority of the Court of Appeal (Lindley, M.R., and Rigby, L.J.) agreed with Kekewich, J., that the conversion into English money ought not to be made until the balance due was ascertained by the delivery of the account on 13th November, 1897. Williams, L.J., however, dissented and was of opinion that the conver-

sion ought to be made into English currency as of the dates when the moneys became payable, but as the plaintiff was willing that the value in English money on 31st Aug., 1896, should be taken as the basis, he assented to that date as the proper one for conversion of the amount then admitted to be due. The point was of some importance to the plaintiff, inasmuch as the value of the Mexican dollar had depreciated 7¼d. between Aug. 31, 1896, and Nov., 1897.

INSPECTION—RIGHT TO TAKE COPIES.

In *Boord* v. *African Consolidated Land Co.* (1898) 1 Ch. 596, the question was, whether a shareholder of a joint stock company, who had a statutory right to inspect the register of shareholders, was also entitled by virtue of that right, to make copies of the entries in such register. North, J., held that he was, and that a right of inspection carries with it a right to take a copy, unless such right is expressly or impliedly negatived by the statute giving the right of inspection.

STATUTE—CONSTRUCTION—EJUSDEM GENERIS.

In re Stockport Schools (1898) 1 Ch. 610, is an illustration of the application of the ejusdem generis rule to the construction of a statute. By the Charitable Trusts Act, 1853, s. 62 excludes from the exemption contained in that section "any cathedral, chapter, or other schools," and it was held by Stirling, J., that the general words "or other schools" were to be restricted to other schools of the same character as those specifically mentioned.

TRUSTEE—APPROPRIATION OF ASSETS.

In re Nickels, Nickels v. *Nickels* (1898) 1 Ch. 630, Stirling, J., was called on to determine whether a valid appropriation of assets had been made by a trustee to answer the share of one of his cestuis que trustent. By his will a testator gave the proceeds of his residuary estate upon trust as to the income of an undivided one-sixth thereof, to go to each of his five sons and his daughter for their lives, and after their death to pay the capital of each share to their respective children, and he empowered the trustee to pay over a portion of the capital of

the settled shares to any of his six children absolutely, notwithstanding the previous trusts. In 1881 the trustee paid to each of the five sons one half of his share, and to the daughter one sixth of her share absolute, and he also set aside for the daughter and her children a sufficient sum of stock at its then value to make up, with the sum advanced, one-half of the daughter's share, and the income of this stock was paid to the daughter till her death in 1896. Stirling, J., held that this was a valid appropriation of the stock to the daughter's share, and that the distribution to her children ought to proceed on that footing.

MARRIED WOMAN—SEPARATE ESTATE—MORTGAGEE—CONVEYANCE.

In re Brooke & Fremlin (1898) 1 Ch. 647, was a matter under the Vendor's and Purchaser's Act, in which the point presented for adjudication was whether a married woman, who under the Married Woman's Property Act, 1882, (see R.S.O. c. 163, s. 3, Ib. c. 165, s. 3) was entitled as mortgagee, could make a valid conveyance of the mortgaged estate without the concurrence of her husband, or acknowledgment of the deed under the Fines and Recoveries Act, and he held that she could.

FORFEITURE—LANDLORD AND TENANT—BREACH OF COVENANT—NOTICE OF BREACH OF COVENANT BY TENANT, SUFFICIENCY OF—RE-ENTRY—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. C. 41) S. 14—(R.S.O. C. 170, S. 13).

In re Serle, Gregory v. *Serle* (1898) 1 Ch. 652, shows that where a landlord gives notice of breach of covenant by tenant, with a view to enforcing a right of re-entry, the notice under the Act (see R.S.O. c. 170, s. 13) must be specific as to all of the breaches complained of, and that a notice to the tenant that he "has not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is nugatory, and the fact that other breaches of covenant which are complained of are sufficiently specified, will not make the notice sufficient. In arriving at this decision Kekewich, J., follows *Fletcher* v. *Nokes*, (1897) 1 Ch. 271, noted ante, vol. 33, p. 388.

CHARGE ON LAND—LOCKE KING'S ACT (17 & 18 VICT. C. 113)—(R.S.O. C. 128, S. 37)—MORTGAGE BY DECEASED PARTNER TO SECURE PARTNERSHIP DEBT—DEVISE OF REAL ESTATE.

In re Ritson, *Ritson* v. *Ritson* (1898) 1 Ch. 667, the question was whether the devisee of land of a deceased partner, mortgaged by him for payment of a partnership debt, was subject to the provisions of Locke King's Act (17 & 18 Vict., c. 113) from which R.S.O. c. 128, s. 37, is derived, the assets of the partnership being sufficient for the payment of all the debts of the partnership. Romer, J., held that he was not, and that he was entitled to have the land devised, exonerated from payment of the mortgage debt out of the partnership assets, notwithstanding the statute.

MASTER AND SERVANT—AGREEMENT TO DEVOTE WHOLE TIME—NEGATIVE STIPULATION—BREACH OF CONTRACT—SPECIFIC PERFORMANCE.

Ehrman v. *Bartholomew* (1898) 1 Ch. 671, shows that there is a limit to the right to enforce specifically a negative stipulation in a contract for service. In this case the defendant had agreed to serve the plaintiffs as a traveller for the term of ten years from 10th Aug., 1897, and to devote his whole time to the business of the plaintiffs, and not directly or indirectly engage in the service of any other person during that time. The defendant having left the plaintiff's employment, and entered the service of another firm carrying on the same kind of business as the plaintiffs, an action was brought for an injunction to restrain him from acting as traveller for any other firm. Romer, J., held that the stipulation sought to be enforced was an unreasonable restraint of trade, and could not be specifically enforced. The learned judge distinguishes the case from *Lumley* v. *Wagner*, 5 DeG. & S. 485; 1 D.M. & G. 604, on the ground that in that case the negative stipulation only applied to a certain special service, viz., singing in public, whereas in this case, the stipulation extended to every kind of business.

TRADE NAME—FORMER CONCURRENT USER OF, BY TWO FIRMS—DISCONTINUANCE AND RESUMPTION OF USE OF TRADE NAME.

Daniel v. *Whitehouse* (1898) 1 Ch. 685, was an action to restrain the use by defendant of a trade name applied to certain articles of the plaintiff's manufacture. The peculiarity of the case arises from the fact that the name in question, "Brazilian silver," had formerly been in use by the plaintiffs and defendants concurrently. It appeared that the plaintiffs had continuously used the name as applied to goods manufactured by them since 1886, and had established a large trade in goods so styled; and that from 1885 to 1887 the defendant had also used the name as applied to goods made by him, but that from 1887 to 1894 only a few sales had been made by the defendant under that name, and that in 1894 they had ceased altogether. It also appeared that the goods called "Brazilian silver" were now known to the trade and the public as the plaintiff's make. Barnes, J., under the circumstances, considered the case came within "the Yorkshire Relish" case: *Powell* v. *Birmingham Vinegar Brewery Co.* (1894), 3 Ch. 449, noted ante, vol. 31, p. 117, and granted the injunction as prayed, viz., restraining the defendant from using the name "Brazilian silver" in connection with, or descriptive of his goods without so distinguishing them from the plaintiff's goods, so that nobody might mistake the one from the other.

A doctor sued a labourer in the County Court for Cambridgeshire, England, for professional services rendered in pursuance of an engagement to attend the labourer's wife during her confinement. Before the child was born the wife engaged another medical man. The County Court judge was of the opinion that the doctor who was originally engaged had no legal claim to compensation, inasmuch as he was not called upon actually to attend the mother when she was confined. This view has provoked much adverse criticism in British medical circles; and it is not easy to defend the doctrine of the decision on any ground of good morals. To engage a doctor and thus impose upon him restrictions that may affect his movements for many days, and then employ another physician when there has been no fault or suggestion of fault in respect to the conduct of the first one, is a course of proceeding which certainly ought to render the employer chargeable with a fair and reasonable value of the first doctor's services in holding himself ready to respond to the summons, come when it might, which should call him to the bedside of the patient.—*Ex.*

Correspondence.

UNIFORMITY OF PROVINCIAL LAWS.

To the Editor of the Canada Law Journal:

DEAR SIR,—In a recent number of your valuable journal I observe a paper read by B. Russell, Q.C., of Halifax, Nova Scotia, under the title of "Provisions of the British North America Act for Uniformity of Provincial Laws," and in connection with the matters therein treated of, my attention has been particularly called to the subject in a very important particular, and one, I think, of very great hardship to suitors. Some years ago an action was brought in the High Court here by the plaintiff to recover from the defendant the sum of ten thousand dollars in connection with the promotion and building of the Parry Sound Colonization Railway. The plaintiff recovered judgment for the amount, and an appeal was at once made to the Divisional Court, which court unanimously sustained the finding of the trial judge. From this decision an appeal was made to the Court of Appeal, and that court without dissent again agreed with the Divisional Court. An appeal to the Supreme Court of Canada met with the same result. In all these appeals the only security required was for the Supreme Court costs which were paid. Now comes the hardship: The defendant resides in Montreal, is a contractor, and engaged in an extensive railway contract in Truro, Nova Scotia, where he has engaged temporary residence. On enquiry there as to the means of enforcing his judgment, plaintiff is advised that the defendant in the action is entitled under the laws of that Province to put the plaintiff to all the loss of time, trouble and expense over again, as defendant can again set up all or any of the defences he had to the original cause of action. It would appear that this provision is ultra vires, as it virtually overrides the Supreme Court Act, but why should the plaintiff be put to the expense of contesting that matter in the courts?

From the various steps taken by the defendant it is evident that his purpose is to delay or defeat plaintiff's claim. Being a wealthy man himself he is determined to worry the plaintiff out of his claim sustained by the courts. I write you now in reference to this matter, as the question of uniformity of Provincial laws is under the consideration of the Bar Association of Canada, and so that public attention may be called to the necessity of an early and effective remedy of this and similar grievances.

Parry Sound. SUBSCRIBER.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Exchequer.] GOODWIN *v.* THE QUEEN. [March 8.

Contract—Construction of—Public works—Arbitration—Progress estimate—Engineer's certificate—Approval by head of department—Final estimate Condition precedent—Obiter dicta.

Clauses 8 and 25 of the appellant's contract for the construction of certain public works were as follows :

"8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications and drawings shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed, to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;" but before the contract was signed by the parties the words "as to the meaning or intention of this contract, and the plans, specifications and drawings," were struck out.

"25. Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements, and computed at the prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned, and upon approval of such certificate by the minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof."

A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water tight" embankment under the provisions of the contract and specifications relating to the works, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form, but added after his signature the following words : "Certified as regards item 5 (the item in dispute) in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896." The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor.

Held, that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section, and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract.

Murray v. *The Queen*, 26 S.C.R. 203, discussed and distinguished.

Appeal allowed with costs.

Osler, Q.C., and *Ferguson*, Q.C., for the appellant. *Ritchie*, Q.C., and *Chrysler*, Q.C. for the respondent.

Nova Scotia.] MULCAHY *v.* ARCHIBALD. [June 14.

Debtor and creditor—Transfer of property—Delaying or defeating creditors—13 Eliz. c. 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies, or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. Appeal allowed with costs.

Harris, Q.C., for appellants. *McInnis*, for respondent.

N.-W. Territories.] HEIMINCK *v.* EDMONTON. [June 14.

Municipal corporation—Highways—Old trails in Rupert's land—Substituted roadway—Necessary way—R.S.C. c. 50, s. 108—Reservation in crown grant—Dedication—User—Estoppel—Assessment of lands claimed to be a highway—Evidence.

The user of old travelled roads or trails over the waste lands of the crown in the North-west Territories of Canada, prior to the Dominion Government survey thereof, does not give rise to a presumption that the lands over which they passed were dedicated as public highways. The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor, as shown upon registered plans of sub-division, and laid out upon the ground, had been adopted as a boundary in the descriptions of lands abutting thereon, in the grants thereof by letters patent from the crown.

Held, reversing the decision of the Supreme Court of the North-west Territories, that under the circumstances there could be no presumption of

dedication of the lands over which the old trail passed as a public highway, either by the crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton settlement. Appeal allowed with costs.

McCaul, Q.C., for appellant. *Beck*, Q.C., for respondent.

COURT OF APPEAL.

Practice.] RE MACAULAY, A SOLICITOR. [Sept. 20.

Solicitor—Costs—Taxation—Discretion of local officer—Increased counsel fees.

The decision of a Divisional Court, 17 P. R. 461, affirmed on appeal.

W. J. Clark, for appellant. *C. R. W. Biggar*, Q.C., for the solicitor.

Province of Ontario.

HIGH COURT OF JUSTICE.

Rose, J.] RENNIE *v.* FRAME. [May 6, 1896.

Limitation of actions—Exclusive possession of land—Receipt of profits—Pasture for cattle.

While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant.

Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour.

Aylesworth, Q.C., and *William Millar*, for plaintiffs. *E. P. Clement*, for defendant.

Divisional Court.] BEAULIEU *v.* COCHRANE. [July 2, 1898.

Trade union—Libel—Malice—Privilege—Evidence.

On appeal by defendant from that portion of the judgment of the trial judge reported ante page 161, directing judgment to be entered for the plaintiff in respect of the libel in the 10th paragraph of the statement of claim, for $300 and costs, heard before Ferguson, Robertson and Meredith, J.J.,

Held, that there was no evidence of malice shown, and in the absence of such evidence that the communication was privileged. Appeal allowed, and the action dismissed with costs. Judgment of MacMahon, J., reversed.

L. G. McCarthy, for the appeal. *A. H. Lefroy*, contra.

Rose, J.] REGINA *v.* THE T. EATON CO., LIMITED. [Aug. 1.

Criminal law—Charge against a corporation—Prohibition—Crim. Code, s. 448—Preliminary enquiry—Indictment.

Sec. 448 of the Criminal Code provides that certain acts constitute an "indictable offence."

Held, the only way in which an offender can be prosecuted for violation of this section is by indictment. A prohibition was therefore awarded against a police magistrate who was holding a preliminary investigation.

Semble, the only way in which a corporation can be prosecuted is by indictment.

Starcy v. *Chilworth Gunpowder Manufacturing Company* (1889), 17 Cox C. C. 55, referred to.

Maclaren, Q.C., for the corporation. *Cavell*, for the informant.

Meredith, J.] MCINTYRE *v.* SILCOX. [Aug. 2.

Insurance for benefit of children—Death of some—Alteration of apportionment by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and re-issue of policies.

A parent insured his life for the benefit of six of his children in equal shares, three of whom died without issue in his lifetime. He then made his will altering the shares of the three survivors, gave a portion to another child, and portions to four grandchildren, caused the policies to be cancelled and new ones issued, payable to "his executors in trust," and died in 1894.

Held, that the apportionments of gifts to the four children were valid, but those to the grandchildren while valid as legacies were not valid as against the rights of creditors.

Held, also, that the application of the provisions in 60 Vict., c. 36, s. 159 (O.), "to any contract of insurance heretofore issued and declaration heretofore made," could not apply to any concluded transaction, but should be limited to those existing at the time of the death of the insured.

Held, also, that the issue of the new policies did not affect the rights of the parties as the executors would take in trust for those who were beneficially entitled.

Videan v. *Westover* (1897), 29 O.R. 1, distinguished.

W. A. Wilson, for the plaintiff. *T. W. Crothers*, for the executors. *J. A. Robinson*, for defendant, L. Clark. *D. B. S. Crothers*, for other adult defendants. *J. S. Robertson*, for the infant defendants.

Meredith, J.] IN RE POWERS AND TOWNSHIP OF CHATHAM. [August 2.

Municipal Corporations—By-law—Repeal—Public Schools Act, R.S.O. c. 292, s.s. 38, 39—Alteration of school sections—Township Council—County Council—Appeal.

A by-law of a township council repealing a former by-law, passed under the provisions of s. 38 of the Public Schools Act, R.S.O. c. 292, whereby a new rural school section was created from parts of three existing sections, was quashed.

Held, that the repeal was not within the power of the council; that the original by-law could be set aside or altered, or its effect prevented or changed, only by means of an appeal to the county council under s. 39, that the township council's power, once regularly exercised, was exhausted, to revive again only at the expiration of five years.

Aylesworth, Q.C., and *A. B. Carscallen*, for applicant. *J. S. Fraser*, for township.

Falconbridge, J., Street, J.] ROPER *v.* HOPKINS. [Sept. 6.

Covenant—Restraint of trade—Breach—Assignment of interest pendente lite.

Upon the plaintiffs becoming the holders of certain shares in an incorporated company carrying on a dairy business, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business, and given a right to re-purchase the shares, and by which he covenanted, among other things, that, if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations," in the same place. The agreement was terminated about six months later, and about a year after its termination the defendant's son began to carry on a similar business in the same place. The defendant without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced his son to customers of the above mentioned company, and solicited orders for his son from them.

Held that, in order to establish a breach of the covenant above quoted, a legal contract of some sort between the defendant and his son must be shown, and, failing such a contract, it could not be said that the defendant was "connected in any way," with his son's business within the meaning of the contract.

Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial.

Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant.

Semble, that the benefit of the covenant would be assignable along with the shares.

Judgment of the County Court of York reversed.

Lobb, for plaintiffs. *J. M. Clark*, for defendant.

Meredith, C. J., Rose J., MacMahon, J.] [Sept. 7.

REAL ESTATE LOAN CO. *v.* GUARDHOUSE.

Division Courts—Jurisdiction—Cause of action—Principal and interest due on mortgage—Splitting of—Assignee of covenant.

In an action brought in a Division Court by the assignee of a covenant of a mesne owner of property subject to a mortgage for one of several gales of overdue interest; the principal also being overdue. On a motion for prohibition,

Held, while under s.-s. 2 of s. 79 of R.S.O. c. 60, a plaintiff might sue separately for the principal and interest due, he must sue for the whole and not portions of either.

Held, also, that the claim of the primary creditors against the primary debtor being as assignee of a covenant their claim was not for interest due on a mortgage, and that the section did not apply. Judgment of Robertson, J., reversed.

Stonehouse, for the appeal. *Mickle*, contra.

Armour, C. J., Falconbridge, J., Street, J.] [Sept. 12.

CREIGHTON *v.* SWEETLAND.

Security for costs—Sheriff—Public duty—R.S.O. c. 89, s. 1.

A sheriff executing a writ of fi. fa. is not an officer or person fulfilling a public duty within the meaning of R.S.O. c. 89, s. 1, and is not, therefore, entitled to security for costs of an action brought against him for negligence in not making a seizure under the writ.

McWhirter v. *Corbett*, 4 C. P. 208, followed.

Biggs, Q.C., for the plaintiff. *H. M. Mowat*, for the defendant.

Leave to appeal refused by the Court of Appeal, Sept. 19.

ELECTION CASES.

OTTAWA PROVINCIAL ELECTION.

RANDAL *v.* POWELL.

Time for presenting petition—Service of notice of presentation of petition—Con. Elect. Act, ss. 9, 15, 135.

Held, 1. The return required to be made to the Clerk of the Crown in Chancery by the returning officer is made when received by such clerk, and not when placed in the express office or in the post office for the purpose of transmission.

2. The omission to serve a separate notice of the presentation of a petition is not fatal to the proceedings, when a copy of the petition itself has been duly served, with the endorsement "This petition is filed," etc.

[May 9, 1898. OSLER, J.A.

This was an application to set aside the petition. Two objections were made to the proceedings:

1. That the petition was presented too late because not presented as it is said within 21 days "after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," as required by s. 9 of the Controverted Elections Act, none of the conditions arising which permit of a presentation at a later date.

2. That no notice of the presentation of the petition was served with the copy of the petition as required by s. 15 of the Act.

W. Nesbitt, for the motion. *Watson*, Q.C., contra.

OSLER, J.A.: In support of the first objection it was contended that the return to the Clerk of the Crown in Chancery is "made" within

the meaning of s. 9, when the returning officer has actually placed it in the express office or in the post office for the purpose of transmitting it to the clerk (s. 135). The inconvenience of such a construction is manifest, as no one would have had any means of ascertaining when a return had been thus made, except by enquiry from the Returning Officer, who is not by law bound to give any information on that subject. The time moreover in which he is bound to "make and transmit" his return varies according to the circumstances mentioned in s. 134. Sec. 139 obliges the Clerk of the Crown in Chancery, on receiving the return, to give, in the next ordinary issue of the *Gazette* "notice of the receipt of the return, the date of such receipt, and the name of the candidate elected." There is no provision whatever which enables anyone with assurance of certainty to ascertain the day in which the return left the hands of the returning officer. The object of s. 139 was to secure the publication of information of which everybody would be obliged to take notice, and I think it was for the very purpose inter alia of fixing the date from which proceedings to attack the election should run. In my opinion, therefore, bound as we are to read these two Acts in pari materia, the return is made to the Clerk of the Crown within the meaning of, or for the purpose of s. 9 of the Controverted Elections Act, when it has been received by him, and not earlier: *Mackinnon* v. *Clark*, (1898) 2 Q.B. Rep. 251.

The second objection is more troublesome, and certainly is provoked by the omission of the petitioner to comply with a plain direction of the Act, but on the whole, after some consideration, I am of opinion that I ought not to yield to it. S. 9 enacts that the petition is to be presented within twenty-one days, etc., and s. 10 that presentation shall be made by delivering it to the Registrar of the Court or otherwise dealing with the same in the manner prescribed. No other manner is prescribed for dealing with it, and thus a petition is presented within the meaning of the Act by simply filing it with the proper officer, with the affidavit required by s. 11, and s. 18 so speaks of it: "Where a petition has been filed, etc." Then s. 15 under the heading "Service" enacts that "Notice of the presentation of a petition under the Act accompanying a copy of the petition shall within five days after the day on which security for costs has been given, etc., etc., be served by the petitioner on the respondent in the manner in which a writ of service is served, etc. No separate notice of presentation was served, but a copy of the petition itself was duly served, on which was endorsed the following: "This petition is filed, etc., etc."

The question is whether the omission of the separate notice of a presentation of the petition is fatal to the proceedings. Under the Controverted Elections Act of 1871, the first statute on the subject in this province, s. 8 provided that notice of the presentation of a petition under this Act, and the nature of the proposed security, accompanied by a copy of the petition, should be served within five days after the security was given, etc. Under that Act security was to be to the amount of $800, and might be given by recognizance by any number of sureties not exceeding four, or by a deposit of money in the manner prescribed, or partly in one way and partly in the other, and it was therefore extremely important that the respondent should have exact notice of

the nature of the security in order that he might at once within the limited time object thereto if given by, or partly by, recognizance. There is a similar provision in the English Controverted Elections Act, 1868, and in the Municipal Election Act, 1872, under the latter of which the case of *Williams* v. *Mayor of Tenby*, 5 C.P.D. 135, was decided. It was held that the omission to serve notice of presentation of the petition and of the nature of the proposed security, was a condition precedent to the maintenance of the petition, and was a thing imperatively required to be done. In giving judgment, Grove, J., remarks, "It is said that there would be hardship supposing money deposited if mere omission of notice should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed, and I see good reason why it should be so. There are two alternatives given, and it is reasonable that the party should know which has been adopted, money deposit or recognizances, and if the latter that he should be set instantly on enquiry, whether the securities are good and valid or not—and not only is the person depositing the security limited as to time, but the person objecting to the security is limited likewise."

Had our Controverted Elections Act remained in the same terms in this respect as when it was first enacted, this decision would no doubt strongly support the respondent's objection. It was, however, amended by 39 Vict, c. 10, s. 29, and security was thenceforward required to be given solely by the deposit of a sum of $1,000, and in the revision of the statutes in 1877, the Commission taking notice of this, omitted that part of the section corresponding to s. 8 above cited, which required notice of "the nature of the proposed security" to be given, though they left that part of it which required service of notice of the presentation of the petition, and so the statute law still stands. The Dominion Act, R.S.C. c. 9, s. 10, still requires notice of the presentation of the petition "and of the security" to be given, and within five days after the petition has been presented, although the security is also by deposit of money only, which is to be made at the time of presentation of the petition.

So far as the Ontario Act is concerned no form of notice of presentation is prescribed. It does not seem necessary that it should specify either when the petition was filed, or when the security was given. The language of the section would be satisfied by a mere notice that a petition had been presented in respect of such and such return under the Act. Had it been required to be signed by the petitioner I might have inferred that the notice was to serve some purpose of verification, and to identify the copy of the petition to be served with that which the petitioner had sworn to. But this is not prescribed. It is difficult to see what purpose is served by a notice of presentation which would be sufficient within the Act, which is not equally well served by the endorsement which appears in the copy of the petition served on the respondent. The reasons which seemed unanswerable in the Tenby case, have here no place, looking at our different legislation. I think, therefore, that the motion must be dismissed, but it is not a case for giving costs to the respondent.

Province of Nova Scotia.

SUPREME COURT.

Macdonald, C. J.] NORTH SYDNEY MINING CO. *v.* GREENER. [July 22.

Equitable execution—Receiver—Application for order to sell bonds refused.

Plaintiff company having recovered a judgment against the defendant for a large sum, obtained an order appointing a receiver, by way of equitable execution, to receive the rents, profits, surplus, and other proceeds, and all moneys which the defendant then was, or thereafter might be entitled to, in respect of his interest in certain bonds of the plaintiff company, which bonds were in the possession of the Eastern Trust Company under an agreement between the defendant and plaintiff company and a third person, by which the first proceeds of the bonds when sold by the plaintiff company were to be paid to the Eastern Trust Company, and $35,000 of such proceeds were to be forthwith paid by the Eastern Trust Company to the defendant. Plaintiff company now applied for an order that the receiver do offer for sale defendant's interest in the bonds.

Held, that there was no jurisdiction to make such an order, and the application was refused. *Flegg* v. *Prentis* (1892), 2 Ch. D. 430, and *De Peyrecave* v. *Nichol*, 42 Weekly Notes, 702, followed.

C. H. Cahan, for plaintiff. *F. F. Mathers*, for defendant.

Macdonald, C.J.] ELLIS *v.* MCDOUGALL DISTILLING CO. [Aug. 2.

Month's notice of intention to proceed—Proceedings in the case.

Plaintiff brought action against defendant company for payment of a dividend, to which defendant company pleaded a defence. The last step taken in the action was notice of trial given about two years before the present motion. The defendant went into liquidation under the winding-up Act, which operated as a stay of all proceedings. The defendant company in July, 1898, gave notice of motion for an order to remove the said stay so far as this cause of action is concerned, and plaintiff objected to the hearing of the motion on the ground that one month's notice of intention to proceed should first have been given.

Held, that defendant's application is a proceeding in the case under O.L.X.R. 9, and is governed by *McLachlan* v. *Morrison*, 23 N.S.R. 139. The month's notice not having been given, the application was dismissed with costs.

J. A. Chisholm, for plaintiff. *J. M. Chisholm*, for defendant company.

Province of New Brunswick.

SUPREME COURT.

Tuck, C. J.] WEATHERHEAD *v.* WEATHERHEAD. [Aug. 30.

Pleading—Set-off—Contract—Tort—60 Vict., c. 24, ss. 112, 113.

The Supreme Court Act, 60 Vict., c. 24, enacts under the title "Set-off and counter claim" as follows: S. 112, "A defendant in any action may set-off against the claim of the plaintiff any right or claim whether such set-off sound in damages or not." S. 113, "Such set-off shall have the same effect as if relief were sought in a cross action and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claims." To an action for breach of contract the defendant pleaded a set-off in trover. The trover alleged was in no wise connected with the contract sued upon. On an application by the plaintiff to strike out the plea:

Held, that s. 112, read in connection with the title preceding it, and s. 113, included counter claim beside set-off, and was not confined to set-off arising in connection with the plaintiff's cause of action, and that the application should be refused.

D. Mullin, for the plaintiff. *H. A. McKeown*, for the defendant.

ST. JOHN COUNTY COURT.

Forbes, Co.J.] BANK OF MONTREAL *v.* CROCKETT. [August 30.

Practice—Form of order—Variance between order and summons—Application to rescind—Leave to sign judgment for want of a defence—Striking out appearance and plea.

A summons was taken out in an action calling upon the defendant to show cause why the appearance and plea should not be set aside, and leave granted to sign final judgment for want of a defence. At the return the defendant objected on the grounds noted in *Bank of Montreal* v. *Crockett*, ante infra, to the appearance and plea being set aside, but the Court empowered the plaintiff to take out the order. The order taken out was merely for leave to sign judgment. The defendant now applied to rescind the order on the ground that there was a variance between it and the summons upon which it was granted.

Held, (1) The plaintiff was not obliged to follow the terms of his summons, but could take any part of the relief asked for if sufficient for his purposes. (2) Leave to sign judgment for want of a defence may be granted under Act 60 Vict., c. 28, s. 48, without the appearance and plea being set aside.

E. F. Jones, for the plaintiff. *D. Mullin*, for the defendant.

Province of Prince Edward Island.

SUPREME COURT.

Sullivan, C.J.] HAYDEN *v.* GOODSTEIN. [Aug. 1.

Practice—Affidavit to hold to bail—Jurat irregular.

This was an application to set aside a bailable writ, and to discharge the defendant from custody on several grounds, inter alia, that the affidavit to hold to bail was insufficient, because the jurat was irregular in that it did not disclose before whom the affidavit was sworn. In other words the word "me" was left out after the word "before." The jurat was as follows: "Sworn before at Charlottetown in Queen's County, etc." concluding in the usual form, and signed by a commissioner. The plaintiff resisted the application on the authority of *Martin* v. *McCharles*, 25 U.C.Q.B. 279, in which a jurat identical with this was held to be good. The defendant cited *The Queen* v. *Bloxam*, 6 Q.B. 528 and *Archibald* v. *Hubley*, 18 Duval 116.

Held, that the jurat was insufficient.

Martin v. *McCharles*, not followed.

McLean, Q.C., and *J. T. Mellish*, for plaintiff. *J. A. McDonald* and *G. S. Inman*, for defendant.

COUNTY COURT.

Queen's Co.] CLARK *v.* PAYNTER. [July 23.

Bills and notes—Consideration.

Action on promissory note. Defence that the note was given for a debt due by defendant's father, who had died intestate, and to whose estate no administration was taken. There was no person who could be sued for the original debt, and defendant was in no sense liable for it, and the note was, therefore, without consideration. Judgment for defendant with costs.

D. A. McKinnon, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] GRAHAM *v.* BRITISH CANADIAN LOAN, ETC., CO. [June 27.

Principal and agent—Constructive notice—Fraud—No lien for taxes paid by mortgagees when mortgage declared fraudulent and void.

Appeal by plaintiffs from the part of that decree of TAYLOR, C. J., noted ante p. 47, giving defendants a lien for taxes allowed with costs on the ground that there is no rule of law or equity enabling the Court to give a party relief who without any interest in the property voluntarily pays money to preserve or protect it. *Falke* v. *Scottish Imperial Ins. Co*, 34 Ch. D. 234; *Leslie* v. *French*, 23 Ch. D. 552, followed.

Appeal by defendants against that part of the judgment which declared their mortgages void dismissed with costs.

Ewart, Q.C., for plaintiffs. *Mulock*, Q.C., for defendants.

Full Court.] QUINTAL *v.* CHALMERS. [July 9.

Practice—Right to reply—New trial.

This was an action before a judge and jury in which the plaintiff claimed damages on a sale of a number of car-loads of oats by sample on the ground that the goods delivered were not equal to sample. The plaintiff appealed from the verdict, which was in favor of defendants, and asked for a new trial on several grounds. The judgment of the Court, which was delivered by KILLAM, J., dwells mainly on a discussion of the evidence, but the case should be noticed here as to the effect on the trial of the judge's refusal to allow the plaintiff's counsel to reply, the defendants having adduced evidence, although only by way of putting in certain documents on the cross examination of one of the plaintiff's witnesses.

Held, (1) following Best on the Right to Begin, s. 132, and *Rymer* v. *Cook*, M. & M. 86n., that plaintiff's counsel has the right to reply if defendant adduces any kind of evidence, whether verbal or written, or ever so trifling or insignificant. (2) The error of the judge in refusing to allow the reply should only entitle the party to a new trial if it appeared that the course of justice had been thereby interfered with and some substantial injury done to the party complaining: *Doe d. Bather* v. *Brayne*, 5 C.B. 655; *Geach* v. *Ingall*, 14 M. & W. 95. (3) In the present case the plaintiff could suffer nothing from the order in which the jury were addressed, as his evidence was weak and the defendants were entitled to the verdict, and that a new trial should not be granted. Application dismissed with costs.

Howell, Q.C., for plaintiff. *Ewart*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Irving, J.] RE TEMPLETON. [Aug. 17.

Life policies—Succession duties—Beneficiary domiciled in B. C.

The proceedings herein were commenced by originating summons for an order that probate of the will of William Templeton, deceased, be issued to his executrix, and for the determination of the question as to whether or not the Succession Duty Act applies to insurance moneys where the same are specifically disposed of under the policies, and also where policies were made payable out of the Province, payment of the duty having been demanded by the registrar.

Under R. S. B. C., c. 175, it is provided (subject to certain exceptions which need not here be referred to) that all property situate within this Province passing by will or intestacy . . . shall be subject to a suc-

cession duty varying in amount to the scale laid down in the Act. The deceased, who, by his will had left everything to his widow, had during his lifetime, taken advantage of the provisions of s. 7 of the Families' Insurance Act, and by a writing identifying three of the policies by their respective numbers had declared those three policies for the benefit of his wife; they therefore formed no part of his estate, and could not pass by his will, and accordingly were not liable to succession duty. There were two other policies payable outside the Province, but the deceased at the time of his death had his domicile within the Province.

Held, that the proceeds of a life policy payable at death without the Province are not liable, in the hands of a beneficiary domiciled in the Province, to succession duty. The Act aims at property having an actual situation within the Province and not to property which can only be deemed to be situate within the Province by legal fiction.

D. G. Macdonell, for executrix. *Charles Wilson*, Q.C., for the Crown.

Walkem, J.] GREEN *v.* STUSSI. [Aug. 24.

Judgment in vacation—Pending trial—Rule 736 (d).

Motion by defendant to set aside a judgment pronounced in favour of plaintiff on August 8, 1898. The action was set down for trial at Victoria on July 30, 1898, and on that day, as there was no judge available to try the case, it was adjourned to August 4, and further adjourned to August 8, when evidence was given, and judgment pronounced by WALKEM, J., in favour of the plaintiff. The defendant did not appear on any of the trial days.

Held, the trial was not pending within the meaning of Rule 736 (d), and that the judge had no jurisdiction to hear it in vacation.

S. Perry Mills, for plaintiff. *L. P. Duff*, for defendant.

Irving, J.] EDWARDS *v.* COOK. [Sept. 8.

Supreme Court, B. C., has no jurisdiction in Admiralty matters.

The Admiralty Act vests all admiralty matters in the Admiralty Court, and there is no jurisdiction in the Supreme Court to interfere.

Bradburn, for plaintiff. *Russell*, for defendant.

Irving, J.] B. C. PERMANENT LOAN, ETC., CO., *v.* WOOTTON. [Sept. 8.

Injunction—Registration of companies—Similarity of names—Cancellation of incorporation.

Motion by plaintiff company for an injunction to defendant, registrar of joint stock companies, to restrain him from cancelling its certificate of incorporation, the registrar having threatened to do so on the ground that the name was so similar to that of the Canada Permanent Loan & Savings Co, previously incorporated, as to be calculated to deceive within the meaning of s. 2 of the Companies Amendment Act. 1898.

Held, that it was not sufficiently clear that the similarity in the names was calculated to deceive to justify the registrar in cancelling the plaintiff com-

pany's certificate, or taking any steps to interfere with its doing business, pending the trial of the action, and that the plaintiff company is consequently entitled to an injunction to restrain him from so doing.

Harris, for plaintiff. *Williams*, for defendant.

EXCHEQUER COURT.

ADMIRALTY DISTRICT.

McColl, C.J.] THE MANAUENCE. [Sept. 8.

Practice—Action in rem—Arrest.

W. H. Cook sued for damages and a return of the amount of his passage money on the ground of failure to transport him according to contract, and caused the ship Manauence to be arrested. This was an application to set aside the warrant of arrest on the ground that such an action could not be brought in rem, the proper form being in personam.

Held, that as far as appeared by the endorsement on the writ and proceedings before the court, the Admiralty practice had been complied with in arresting the ship, and no specific authority for release in such a case having been cited, the application must be refused.

Bradburn, for the Manauence. *Russell*, for Cook.

COUNTY COURT.

Bole, Co. J.] RE MARY LEE'S LICENSE. [Aug. 15.

Liquor license—Cancellation of—County Court Act, s. 30.

Application to County Court Judge for the cancellation of a liquor license issued to Mary Lee by the Steveston Licensing Board. The main objections urged related to the mode and manner of procedure before the Board.

Held, that the Judge's jurisdiction was strictly confined to the question of legality or illegality, and the onus of clearly proving that the license was unlawfully issued lay on the complaint, and that on the facts no such case was made out.

Martin, Q C., Attorney-General, for applicant. *C. B. Macneill*, for Mary Lee.

Obituary.

GUSTAVUS WILLIAM WICKSTEED, who died on the 18th ult., at his residence in Ottawa, was the son of the late Richard Wicksteed, of Shifual, Shropshire. He was born on December 21st, 1799, and was, therefore, in his ninety-ninth year. He came to Canada in 1821, and entering the legal profession was called to the Bar of Lower Canada in 1832. He had previously been appointed Assistant Law Clerk to the Legislative Assembly of Lower Canada. In 1841, after the Union of the Provinces of Upper and Lower Canada, Mr. Wicksteed was appointed Law Clerk to the Legislative Assembly of Canada, which position

he held until he became in due course Law Clerk of the House of Commons of the Dominion of Canada. After having completed fifty-seven years in the public service he was retired on a pension, since which time he has lived in Ottawa, devoting himself to various literary pursuits, and enjoying a well-earned rest.

He was connected with various public duties outside his position as Law Clerk, having been appointed one of the commissioners for revising the statutes of Lower Canada in 1841, and in consolidating the statutes of Lower Canada and Canada respectively in 1856. He devoted himself assiduously to the duties of his office, and was, from time to time, of inestimable value to the various ministers in power, and enjoyed to the full the confidence of all political parties.

His spare time was largely devoted to writing on various questions of interest to the profession and to the public. A number of his essays, short poems and miscellaneous verses have been collected and published, and show that his classical and scholarly attainments, as well as his knowledge of public affairs, were of a very high order. Many articles of his have appeared in the columns of this journal, and were fully appreciated by our readers. Of unblemished reputation, he was respected and beloved by all who knew him. Notwithstanding the great age that he attained he preserved the use of his faculties almost up to the day of his death. His erect form and bright genial face will long be remembered.

SIR CASIMIR GZOWSKI, K.C.M.G., A.D.C. to the Queen.—This talented man, and highly respected citizen, who passed away on August 25, was not known in Canada as a member of the legal profession. He was nevertheless one of us, and as such we record his death. Having been born in St. Petersburg in 1813, he had reached the advanced age of 85. Although best known as an engineer, and for the many great public services rendered to his adopted country, he was in 1837, shortly after arriving in the United States from Poland, which he had to leave after the insurrection against Russia in which he took a prominent part, enrolled as an advocate in Beaver County, Pennsylvania. He practised there for some years, until he came to Canada in 1841. His career since then finds its record in the history of the Dominion.

Book Reviews.

The Law of Mines in Canada, by W. D. MCPHERSON and J. M. CLARK, of Osgoode Hall, Barristers-at-Law; The Carswell Company, 1898.

This volume appears seasonably. It is a comprehensive treatment of a comprehensive subject. The great and growing importance of the mining industry throughout Canada, to use the words of the authors in their preface, "renders some statement of the laws in force therein a matter of convenience amounting almost to necessity."

Chap. I. deals with crown title to lands, mines and minerals, in the various provinces and territories. Chap. II. is a preliminary discussion of the meaning of certain mining terms. Chapters III. to XIII. contain compendious statements of legal principles and rules of more frequent application to mining matters, arranged under such topics as contracts, leases, licenses, workings, aliens and foreign corporations, grants, water, support, taxation, wrongful abstraction, and criminal offences. Chapters XIV. to XIX., inclusive, reproduce the various Provincial and Dominion statutes and regulations in regard to mines and minerals, with notes and comments on the decided cases thereunder, dealing with a selection from the English, American and Australian authorities, wherever analogy would permit of that course being adopted. The notes on the mining laws of the various Provinces appear, from the preface, to have been revised by eminent counsel in each Province, and may therefore be regarded as able and accurate expositions of the laws dealt with.

The appendices, of which there are three, contain the text of a considerable number of statutory enactments not dealt with directly in the text of the work. and apparently completely covering the wide field of subjects kindred to that of mining. They likewise contain a comprehensive list of forms, and a useful glossary of mining terms. The index is particularly well arranged, and very exhaustive, and adds largely to the practical utility of the work.

Taking into consideration the intricacy of the subjects dealt with, the multiplicity, under diverse systems of jurisprudence, of the decisions commented on, and the complicated character of the legislation, Imperial, Dominion and Provincial, discussed, it may be that some criticism will be offered after a more minute examination, but it may safely be said that the authors and publishers have done their work in a highly creditable manner, and have given us a complete and authentic treatise on a subject which touches a great and growing industry.

The Laws of Insurance, by JAMES BIGGS PORTER, of the Inner Temple, Barrister-at-law, etc., assisted by W. F. CRAIES, M.A., and T. S. LITTLE, M.A., Barrister-at-law; Third Edition. London: Stevens & Haynes, Law Publishers, Temple Bar, 1898.

The aim of the author was to produce a book of moderate size, containing in one volume the whole law of insurance (except marine), viz., life, fire, accident and guarantee insurance. The success which the first and second editions met with has proved the value of this work. A third edition has now been called for, which contains about 200 new cases, with some alterations in the text. This work is well known and appreciated in this country, and especially so as, in addition to English, Scotch, Irish and American authorities, it contains a number of cases in our Canadian Courts. We would, however, suggest to the reader to note on p. 213 the recent decision of *Darling* v. *Insurance Companies*, 33 C.L.J. 439, which collects and very intelligently discusses the authorities as to price of stock in trade, and how the insurers' liability is affected by their loss by fire after contract made to sell them at retail prices.

Canada Law Journal.

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We recorded in our last number the elevation of Mr. Archer Martin, of Victoria, to the British Columbia bench, an appointment which has been very well received. He is the second son of Mr. Edward Martin, Q.C., of Hamilton, Ontario, having been born in 1865. In 1887 he was called to the Bar of Manitoba, and in January, 1894, went to Victoria, where he was shortly afterwards appointed counsel for the Dominion Government, and agent for the Minister of Justice in that city. Mr. Martin recently published a book, which is well thought of in England and in this country, on the land tenures of the Hudson's Bay Company. He was for several years editor of the *Western Law Times*, published in Winnipeg. Being only 33 years old, he must be, we think, the youngest Judge on the Canadian Bench. As a brother journalist we congratulate him upon his appointment, and venture to predict that he will prove a most useful member of the Bench.

Attention has been called in England to what has been styled a "judicial eccentricity," viz.: the sentencing of a prisoner, who was a Frenchman, in his own language. The sentence should undoubtedly have been pronounced in English, but as the prisoner was a Frenchman he was given the benefit of a sentence in a language which he could understand, and probably no great harm was done. There is not much fear of England (whatever may happen in a peaceable manner to the English speaking people in Canada) being dominated either by Frenchmen or the French language. As a contemporary remarks, since the time of Edward III. our own tongue has taken the place of the French in the courts

of law, and although the language of the statutes prior to the reign of Richard III. is generally in Latin or French, all the statutes of Richard III. are in English, and so they continue to be drawn in all subsequent periods. Mr. Justice Darling, who pronounced the sentence, should first have delivered the sentence in English, and then, if thought proper for the benefit of the prisoner, have interpreted it to him in French.

We notice in the issue of the *American Law Review* for August last a discussion by our esteemed contributor, Mr. C. B. Labatt, as to the right of employers to carry on their business with extra-hazardous appliances. The author notices a fact which, so far as we know, has not received as much attention as it deserves, viz., that the period which witnessed the earlier stages of the development of the doctrine of assumption of risks was absolutely dominated by the ideas of the laissez faire school of political economists, and that the more rigorous applications of this doctrine are merely a juridical deduction from the theories of non-interference by the state, and of the sanctity of freedom of contract. It is argued, in the article referred to, that, as those theories have been rudely shaken by the logic of events which have shown conclusively that unrestrained competition cannot be safely trusted to produce the best social results, the law finds itself in the awkward position of administering principles which depend upon discredited hypotheses. It is almost universally admitted by modern thinkers that the state cannot, without serious injury to itself, hold aloof altogether from the struggle between capital and labor, and it is a decided anomaly that the judiciary should be unwilling to recognize this fact. Never, perhaps, has the operation of the rule of stare decisis been productive of greater mischief than it has been in fettering the American courts to precedents resting upon these antiquated theories of the relations between employers and employed. As matters stand, legislation probably furnishes

the only means by which this very important branch of the law can be brought into harmony with the views which have come into vogue since its foundations were laid—a remark which, it may be observed in passing, is to some extent applicable to our own country as well as to the United States, to which the article has a more special reference, though the doctrine of assumption of risks has, so far as the English colonies are concerned, been deprived of much of its sting by the well-known case of *Smith* v. *Baker* (1891) A.C. 325, whilst the "Workmen's Compensation Act" has done away with a few of the more odious results of the defence of common employment.

We have recently given the profession in this Dominion the benefit of the learned writer's views on a recent judgment of the Court of Appeal for Ontario, touching on another point in the law of Master and Servant. (See ante, p. 587). Letters received show that his very able criticism has, in the opinion of at least some of the leading members of the profession, seriously impaired the value of the decision referred to.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act).

FRAUD—JUDGMENT OBTAINED BY—PRACTICE—ACTION TO SET ASIDE JUDGMENT OBTAINED BY FRAUD.

Cole v. *Langford* (1898) 2 Q.B. 36, was an action brought to set aside a judgment in a previous action which had been obtained by false and fraudulent evidence. The action was undefended. The motion for judgment in default of defence was heard before a Divisional Court (Ridley and Phillimore, JJ.), who, after hearing argument, held that there was jurisdiction to entertain the action, and judgment was granted as prayed; Phillimore, J., referring to *Priestman* v. *Thomas* (1884) 9 P.D. 210, where similar relief was granted.

JOINDER OF PLAINTIFFS—SEPARATE CAUSES OF ACTION—PRACTICE—STRIKING OUT STATEMENT OF CLAIM AS EMBARRASSING, ORD. XVI. R. 1—(ONT. RULE 185).

In *Stroud* v. *Lawson* (1898) 2 Q.B. 44, a motion was made to strike out the statement of claim as embarrassing. The statement of claim alleged as a cause of action that the plaintiff had been fraudulently induced to take shares in a company of which the defendants were directors, and claimed damages against them in consequence. It also alleged that the defendants had paid a dividend on the shares so subscribed for by the plaintiff when there were no profits, and he claimed on behalf of himself and all other shareholders, a declaration that such payments were ultra vires and illegal, and judgment for repayment by defendants of the amount of such dividend to the company. Darling, J., had affirmed the order of a master refusing the application, but the Court of Appeal (Smith, Chitty and Williams, L.JJ.) were of opinion that notwithstanding the alteration made in the Rule, ord. xvi., r. 1 (Ont. Rule 185) consequent on *Somurthwaite* v. *Hannay* (1894) A. C. 494, a plaintiff could not join two causes of action in different capacities, unless he could show that they both arise out of the same transaction. In this case the right which the plaintiff claimed in his representative capacity was held to be quite independent of any fraud on the part of the defendants in inducing him to subscribe for the stock, and therefore the two causes of action did not arise out of the same transaction within the meaning of the Rule. The order of Darling J., was therefore reversed, and the statement of claim was ordered to be struck out unless the plaintiff elected as to which of the two causes of action he would proceed for.

LIBEL—NEWSPAPER—PLEADING—PAYMENT INTO COURT—LIBEL ACT, 1843 (6 & 7 VICT., C. 96), S. 2—(R.S.O., C. 68, SS. 6, 7).

Oxley v. *Wilkes* (1898) 2 Q.B. 56, was a libel case against a newspaper. The defendant pleaded under s. 2 of the Libel Act, 1843 (see R.S.O., c. 68, ss. 6 and 7), that the libel was published without actual malice and without gross negligence, and payment into Court of £5. At the trial the jury found the publication was without actual malice, but not

without gross negligence, and they assessed the damages at £5. Upon these findings the judge at the trial gave judgment for the plaintiff for £5, and the Court of Appeal (Smith and Williams, L.JJ.), held that this was right, as the defence had failed as to the question of negligence, and the payment having been made as part of the defence under the Libel Act it could not be treated as a general payment into Court, so as to entitle the defendant to judgment on the ground that the plaintiff had not recovered more than the amount paid in. Owing to the difference between the English and Ontario Statutes and Rules it may, however, perhaps be doubtful whether this case would necessarily be followed in Ontario.

SALE OF GOODS—BILL OF LADING—SALE BY PERSON HAVING BILL OF LADING—PASSING PROPERTY—POSSESSION OF GOODS—SALE OF GOODS ACT, 1893 (56 & 57 VICT., C. 71), S. 19, S.-S. 3; S. 25, S.-S. 2—FACTORS ACT, 1889 (52 & 53 VICT., C. 45), S. 2, S.-S. 2—(R.S.O., C. 150, S. 5).

Cahn v. *Pocketts B.C.S.P. Co.* (1898) 2 Q. B. 61, was an action to recover goods sold by a person without authority of the owners, under the following circumstances: The goods in question consisted of a quantity of copper sold by Steinmann & Co. to one Pintscher. The copper was shipped on the defendants' steamer, and Steinmann forwarded the bill of lading to Pintscher, together with a bill of exchange for acceptance. Pintscher refused to accept the bill, but kept the bill of lading and, in fraud of Steinmann, sold the copper to the plaintiffs, in whose favour he indorsed the bill of lading. Steinman thereupon stopped the delivery of the copper; and the question was whether under the Sale of Goods Act, 1893, and the Factors Act, 1889 (see R.S.O., c. 150, s. 5), the plaintiffs had acquired a good title as indorsees of the bill of lading. By the Sale of Goods Act, s. 19, s.-s. 3, where a seller of goods draws on the buyer fot the price, and transmits the bill of exchange with the bill of lading, if the buyer does not accept the bill of exchange he is bound to return the bill of lading to the seller. This, however, merely gives statutory sanction to the decision of the House of Lords in *Shepherd* v. *Harrison*, L.R. 5 H.L. 116, but it was claimed by the plaintiffs, notwithstanding, that under the Factors Act, the buyer

having in his possession the bill of lading was an agent entrusted therewith, and competent to confer a title; but Mathew, J., was of opinion that he was not an agent within the meaning of the Act, and not entrusted with the bill of lading "with the consent of the seller" within the meaning of s. 25, s.-s. 2 of the Sale of Goods Act, 1893. How far this case may be of authority for the construction of R. O., c. 150, s. 5, needs some consideration, owing to the difference in the statute law of England and Ontario. The case is, however, one which can hardly be neglected in considering the Ontario Act.

CHATTEL MORTGAGE—MORTGAGEE TAKING POSSESSION FOR DEFAULT IN PAYMENT OF INSTALMENT—RIGHT OF MORTGAGOR TO REDEEM—REDEMPTION —ACCELERATION OF PAYMENT OF PRINCIPAL.

Ex parte Ellis (1898) 2 Q.B. 79. In this case a chattel mortgagee had taken possession of the mortgaged property for default in payment of an instalment of interest, whereupon the mortgagor claimed the right to redeem the mortgage, which did not become due until the end of two years. Darling, J., held that he was so entitled; but the Court of Appeal (Smith & Williams, L.JJ.) held, that as the mortgagee had merely taken possession for the purpose of enforcing payment of the interest in arrear, and not for the purpose of recovering the principal, the mortgagor had no right to accelerate the payment of the principal.

BY-LAW—REASONABLENESS—PREVENTION OF STREET SINGING AND MUSIC— DIVISIONAL COURT DECISION OF, WHEN NOT BINDING ON ANOTHER DIVISIONAL COURT.

In *Kruse* v *Johnson* (1898) 2 Q.B. 91, a strong Divisional Court (Lord Russell, C.J., Jeune, P.P.D., Chitty, L.J., and Wright, Darling, Channell and Mathew, JJ., was called on to determine the validity of a municipal by-law prohibiting any person playing music or singing in any public street within fifty yards of any dwelling house after being requested by any constable, or an inmate of such house, or his or her servant, to desist. The Court held that the by-law was valid, Mathew, J., dissenting, and, in doing so, the majority of the

Court lays down the principle that in considering the validity of by-laws made by a public representative body like a county council the Court ought to be slow to ajudge them unreasonable, unless they find them to be partial and unequal in their operation as between different classes, or manifestly unjust, or made in bad faith; or involving oppressive and gratuitous interference with the rights of those subject to them, as would in the minds of reasonable men be without justification. Mathew, J., suggests that in cases where there is no appeal from the decision of a Divisional Court, the decisions of one Divisional Court are not binding on another. This view was recently acted on by the Chancery Divisional Court in Ontario, sitting as a Court for Crown Cases reserved, when it differed from a previous decision of a similar court composed of the Judges of the Queen's Bench Division. See *Queen* v. *Hammond*, 29 Ont. 211.

INSURANCE—BURGLARY—LOSS BY THEFT—ENTRY BY OPENING DOOR—ACTUAL FORCIBLE AND VIOLENT ENTRY.

In re Goldsmiths and General Burglary Ins. Co. (1898) 2 Q.B. 136, a special case was stated by an arbitrator in this case. A policy of insurance was expressed to be made against "loss or damage by burglary and housebreaking as hereinafter defined," and witnessed that if the property, which was jewellery, should be lost by theft following upon actual forcible and violent entry upon the premises wherein the same was situate, the insurers should pay. The jewellery was in a shop, the front door of which was shut, but not locked or bolted, and access could be gained by turning the handle of the door. In the absence of the porter, before the shop was opened for business in the morning, somebody opened the front door, entered the shop and stole the jewellery. The question was whether this was a loss covered by the policy. Wills and Kennedy, JJ., held that it was, and that the words "actual forcible and violent entry" excluded a constructive entry, but were satisfied by an actual entry, although not accompanied by any great degree of force or violence—provided it was such as to constitute housebreaking or burglary of the premises, and was equivalent to "breaking and entering."

EVIDENCE—COMMISSION—SENDING SUBJECT MATTER OF ACTION OUT OF JURISDICTION FOR INSPECTION OF WITNESSES—ORDER XXXVII. R. 5, ORD. L., R. 3 (ONT. RULES 499, 1096).

Chaplin v. *Puttick* (1898) 2 Q.B. 160. This was an action brought to recover a stamp album alleged to have been stolen from the plaintiff at Johannesburg, in the Transvaal. On his application the album was ordered to be sent out to the Transvaal for the purpose of being inspected by witnesses for the plaintiff, who were to be examined by commission. The application being based on the provisions of Rules, Ord. xxxvii. r. 5, Ord. l., r. 3. (Ont. Rules 499, 1096).

INTERPLEADER—PAYMENT INTO COURT BY CLAIMANT—SUBSEQUENT SEIZURE OF SAME GOODS BY ANOTHER CREDITOR—FURTHER PAYMENT INTO COURT—PRACTICE.

In *Kotchie* v. *Golden Sovereigns* (1898) 2 Q.B. 164, goods had been seized under execution, and had been claimed by a third person, as between whom and the creditor an interpleader issue had been directed, the claimant paying the value of the goods into Court to abide the result. The goods were subsequently seized by another execution creditor, and again claimed by the same claimant, and the question was whether he could be required, as against the subsequent execution creditor, again to pay the value of the goods into Court. Grantham, J., held that he was only liable to pay the extra costs, but the Court of Appeal (Smith and Chitty, L.JJ.) allowed the appeal from his order, and held that the second execution creditor was entitled to require security to be given for the full value of the goods, as the first payment into court did not operate as a purchase of the goods.

BILLS AND NOTES—ENDORSER LIABILITY OF—ENDORSEMENT OF INCOMPLETE BILL—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., S. 61) SS. 55, 56 (53 VICT., C. 33, SS.).

Jenkins v. *Coomber* (1898) 2 Q.B., 168, was an action against an indorser of a bill of exchange which failed, because at the time of the indorsement by the defendant, the bill was incomplete. The facts of the case were as follows: Arthur Coomber owed the plaintiffs money, and for the purpose of securing the amount due, it was agreed that the plaintiffs

should draw a bill on Arthur Coomber, which Alfred Coomber, the defendant, should indorse. The plaintiffs accordingly drew a bill on Arthur, payable to their own order, which was accepted by Arthur, and indorsed by Alfred Coomber, and handed to the plaintiffs, and afterwards indorsed by them. Under these circumstances it was held by Wills and Kennedy, JJ., that the defendant was not liable to the plaintiffs as indorser under the Bills of Exchange Act, s. 56 (53 Vict. c. 33, s. 56 D.), because when he indorsed it, it was not a regular and complete bill of exchange, it not having been then indorsed by the plaintiffs, to whose order it was made payable. Neither was the defendant liable as an indorser to the plaintiffs under s. 55, s.-s. 2 (53 Vict. c. 33, s. 55 D.) because they were prior parties to the bill, and the case was therefore governed by *Steele* v. *McKinlay*, 5 App. Cas. 754, the contract of indemnity on which the plaintiff relied as making the defendant primarily liable to the plaintiff not being recognized by the law merchant, and as a contract of suretyship being insufficient under the Statute of Frauds.

In connection with this case *Duthie* v. *Essery*, 22 A.R. 191, may be referred to, where an indorser indorsed a note before it had been delivered to the payee or indorsed by him, but nevertheless was held liable to a holder "in due course."

SHERIFF—EXECUTION—GOING OUT OF POSSESSION—ABANDONMENT OF SEIZURE.

In *Bagshawes* v. *Deacon* (1898) 2 Q.B. 173, the question upon an interpleader issue was whether a sheriff, who had seized the goods in question, had gone out of possession. Deacon, the execution creditor, had a judgment against Bagshawe Bros. on which he issued execution which he placed in the sheriff's hands, who seized thereunder the goods in question. Bagshawe & Bros. had previously agreed to sell the property seized to a trustee for Bagshawes, Limited, and on 10th July, when the sheriff went in, the sale was about to come off. The officer was told that the goods were about to be sold, and he was given a paper by one of the execution debtors under which, if the man in possession was withdrawn, he was to be at liberty to re-enter at any time until the action

of the execution creditor was settled. The sheriff's man was thereupon withdrawn. The proposed sale was then completed on 12th July, to the claimants Bagshawes, Limited, and they took delivery of the property in dispute. On the 13th July the sheriff's officer again took possession of the goods under Deacon's fi. fa. The Court of Appeal (Smith and Chitty, L.JJ.) affirmed the judgment of Ridley, J., in favour of the claimant's, holding that on the evidence the sheriff must be taken to have abandoned the seizure, that the question of abandonment is one of fact, and the evidence in the case showed that the sheriff had withdrawn because the debtor had represented that it would be inconvenient to have him in possession, pending the contemplated sale, and he must therefore be taken to have abandoned the seizure to enable the sale to be completed.

DISCOVERY—SHIP'S PAPERS—MARINE INSURANCE.

In *China Traders' Ins. Co.* v. *Royal Exchange Ins. Co.* (1898) 2 Q.B. 187, the Court of Appeal (Smith, Chitty, and Williams, L.JJ.) overruled Mathew, J., on a point of practice. The action was on a policy of marine re-insurance, in which the defendants applied for discovery of the ship's papers, which Matthew, J., refused, but which the Court of Appeal held they were entitled to.

SOLICITOR'S LIEN—ADMINISTRATION ACTION—DOCUMENTS IN SOLICITOR'S POSSESSION BEFORE ACTION—THIRD PARTIES, RIGHT OF, TO PRODUCTION OF DOCUMENTS.

In re Hawkes, Ackerman v. *Lockhart* (1898) 2 Ch. 1, a solicitor of executors who were parties to an administration action, had documents relating to the estate which had come into his possession before action commenced. Third parties interested in the estate applied to have the documents produced for the purpose of the administration proceedings; the solicitor resisted the application, alleging a lien on the documents for his costs. The fact that the documents had come into the solicitor's possession before action was relied on, as taking the case out of the ordinary rule, that documents required for the purpose of an administration action in which

third parties are interested must be produced, notwithstanding a solicitor's lien thereon, but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) agreed with Kekewich, J., that that circumstance did not affect the right of the third parties to production, and it was accordingly ordered, and the solicitor was ordered to pay the costs of the application and appeal.

DOMICIL—INTERNATIONAL LAW—MARRIAGE—MATRIMONIAL DOMICIL—CHANGE OF DOMICIL—MOVABLE GOODS—FRENCH LAW—COMMUNITY OF GOODS.

In re De Nicols, De Nicols v. *Curlier* (1898) 2 Ch. 60, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Kekeiwich, J., (1898) 1 Ch. 403 (noted ante, p. 374), holding that by reason of the change of domicil after marriage, the law of the matrimonial domicil of the parties ceased to govern their rights in the movable goods of the spouses, and as, at the time of the husband's death, the parties were domiciled in England, the law of England governed the rights of the parties in unsettled movable property, and that the whole of the husband's personal estate was effectually disposed of by his will. The decision of the House of Lords in *Lashley* v. *Hog*, 4 Pat. 581 was considered to govern the case.

ARBITRATION—STAYING PROCEEDINGS—STEP IN THE PROCEEDINGS—APPLICATION TO STAY PROCEEDINGS—TIME—ARBITRATION ACT, 1889 (52 & 53 VICT. C. 49) S. 4—(R.S.O. C. 62, S. 6.)

In *Zalinoff* v. *Hammond* (1898) 2 Q.B. 92, an application was made by a defendant to stay the action on the ground that the plaintiff had agreed to refer the matters in question to arbitration. Under the Arbitration Act, 1889, s. 4 (see R.S.O. c. 62, s. 6.) such an application is required to be made by a defendant at any time after appearance, but before delivering pleadings, or taking any other steps in the proceedings. The defendant in the present case had filed affidavits in answer to a motion by the plaintiff for a receiver, but this was held by Stirling, J., not to be a step in the proceedings within the meaning of the section.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT BY ONE OF TWO EXECUTORS AND TRUSTEES—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 W. 4, C. 27), S. 42—(R.S.O., C. 133, S. 17).

Astbury v. *Astbury* (1898) 2 Ch. 111, is a case as to the sufficiency of an acknowledgment under the Statute of Limitations (see R.S.O., c. 133, s. 17). The acknowledgment in question was given by one executor and trustee without the consent and concurrence of his co-executor or trustee, that more than six years arrears of interest was due on the plaintiff's mortgage, and it was held by Stirling, J., not to be a sufficient acknowledgment to bind the real estate under the Act, although it might be sufficient to bind the personal estate, a point which he did not decide. This decision turns on the ground that, qua executor, he had no power to bind the land, and as trustee of the land he could not bind it without the concurrence of his co-trustee. But in Ontario where an executor, qua executor, has a similar power over the land to that which he has over the goods of his testator, it is possible that the consent of an executor under such circumstances might be sufficient.

SPECIFIC PERFORMANCE — CONTRACT — VENDOR AND PURCHASER — "SUBJECT TO APPROVAL OF CONDITIONS AND FORM OF AGREEMENT"—MISTAKE RESCISSSION—INTEREST—WILFUL DEFAULT.

North v. *Percival* (1898) 2 Ch. 128. This was an action for specific performance of a contract for the sale of land. By "heads of agreement" between the plaintiff and defendant it was agreed that the plaintiff should purchase "36 acres of land," the boundaries of which were accurately defined on three sides, but not on the fourth, for £3,600, "subject to the approval of conditions and form of agreement by purchaser's solicitor." The defendant subsequently discovered that the land he intended to sell measured 42 acres, and he refused to carry out the sale, unless the plaintiff took the 42 acres at £4,200. The plaintiff on the other hand insisted that the contract should be carried out for the 36 acres, and brought the action for specific performance. The contract contained a stipulation that if the purchase was not completed by a day named, the purchase money should bear interest from that

day until actual completion. Kekewich, J., held that the plaintiff was entitled to specific performance, because the fourth boundary could be readily fixed so as to include 36 acres, and the "heads of agreement" constituted a completed agreement, and that the clause "subject to the approval, etc.," was not a condition precedent to its taking effect, and that there was no such mistake as would entitle the defendant to a recission of the contract. He, however, held that the defendant's resisting specific performance did not constitute "wilful default" so as to disentitle him to interest on the purchase money.

HOUSE OF LORDS—FINALITY OF DECISION BY.

In *The London Street Tramways Co.* v. *The London County Council* (1898) A.C. 375, the House of Lords lays down the very reasonable rule that its decision on a point of law is conclusive and binding in all subsequent cases, and the law as so settled can only be altered by statute; whether this rule has always been observed, however, is we think open to doubt. We presume the same finality should, and theoretically does, attach to decisions of the Judicial Committee of the Privy Council, though its decisions in ecclesiastical cases are certainly hard to reconcile. The Lord Chancellor is careful to point out that where a previous decision is based on a mistake of fact, as for instance, an omission to notice the existence of a statute affecting the question, or an erroneous assumption that a statute is in force when in fact it is repealed,—in such a case the decision would not have a binding effect.

CONTRACT—CONSTRUCTION—"ERECTION OR USE."

Southland Frozen Meat Co. v. *Nelson* (1898) A. C. 442, is a decision of the Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Herschell, Macnaghten and Morris, and Sir R. Couch) on an appeal from New Zealand. The point at issue was the construction of a contract whereby the respondents had agreed with the appellants "not to erect or assist, or be in any way concerned or interested in the

erection of or use of freezing works at Bluff." The respondents had thereafter contracted with one Ward to purchase all frozen meat produced at his works at Bluff, and also to purchase his freezing works at Bluff at the expiration of their contract with the appellants, together with additional works to be completed at that date. It was claimed that this was a being "concerned or interested in the erection or use of freezing works at Bluff" in breach of the respondents' contract with the appellants, but the Privy Council affirmed the judgment of the New Zealand Court, dismissing the action, being of opinion that the "use" contemplated by the contract was the manufacturing use, and not the mere buying of the output of other works; and that the agreement to buy the contemplated additions to Ward's works was not assisting or being in any way concerned in the erection of "freezing works" within the meaning of the contract.

COMPANY—STATUTORY DUTIES OF—BREACH OF—CAUSE OF ACTION.

Johnston v. *Consumers Gas Co.* (1898) A.C. 447, is a question which has excited some interest in Toronto, the action having been brought by the plaintiff on behalf of himself and other consumers of gas, to compel the Consumers Gas Co. of that city to refund alleged overcharges for gas supplied by them in excess of what they were entitled to, and to compel them to fulfil certain statutory obligations. The Court of Appeal dismissed the action (see 23 A.R. 566), on the ground that the plaintiff had no locus standi, because the special case agreed to between the parties contained no admission of the alleged overcharge. In dismissing the appeal the Judicial Committee (The Lord Chancellor and Lords Watson, Macnaghten and Morris, and Sir R. Couch) take somewhat broader ground and hold that no individual customer has any right of action against the company for alleged non-compliance with their statutory duty, but that the corporation of the city alone has power to enforce the due performance of those obligations.

STATUTE—RETROSPECTIVE EFFECT OF.

Young v. *Adams* (1898) A.C. 469, may be referred to as bearing on the question when a retrospective effect ought to be given to a statute. The Judicial Committee of the Privy Council (Lords Watson, Macnaghten and Morris, and Sir R. Couch) affirm the rule that a statute ought never to be given a retrospective effect, unless the intention of the legislature that it shall be so construed, is expressed therein in plain and unambiguous language.

MUNICIPAL ELECTION—NOMINATION PAPER—ELECTION ORDER—1898 R. 4 (2)—(R.S.O. c. 223, s. 128 (1).

Cox v. *Davis* (1898) 2 Q.B. 202, is a case which may be useful as an authority for the construction of the Municipal Act (R.S.O. c. 223) s. 128 (1). The point in question was as to the validity of a nomination paper, which under the English Election Ord. 1898, r. 4 (2) is required to contain the names of the candidate nominated, and to be signed by the proposer and seconder, as does s. 128 (1) of the Municipal Act. The paper in question was in proper form, but the name of the candidate had been filled in after the paper had been signed by the proposer and seconder, but there was no evidence that the proposer and seconder had not assented to the name filled in as candidate. Grantham and Lawrance, JJ., held that the paper was valid, though conceding that it would not be so if the name filled in had not been assented to by the proposer and seconder. The decision of the returning officer in favour of the validity of the paper was, under the Election Ord. 1898, r. 7, held to be final and conclusive, and the case cannot, therefore, be regarded as an authority.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] MURRAY *v.* JENKINS. [June 14.

Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact.

Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her, and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her, and was set aside by the court on the ground of error, as the parties were not ad idem as to the subject matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands. Appeal allowed with costs.

Newcombe, Q.C., for appellant. *Borden*, Q.C., for respondent.

Ontario.] BOULTON *v.* BOULTON. [June 14.

Estoppel—Conveyance by married woman—Agreement—Recital.

B., a married woman, in order to carry out an agreement between her husband and his creditor, consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on the farm, and of indemnity against her personal liability on a mortgage against said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels, but gave the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor.

Held, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife; and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage. Appeal dismissed with costs.

Wallace Nesbitt, and *W. J. Clarke*, for appellants. *O'Flynn*, for respondent.

New Brunswick.] WALLACE *v.* LEA. [June 14.

Married woman—Separate property—Conveyance—Contracts—C.S.N.B. c. 72.

Sec. 1 of C.S.N.B. ch. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband, and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power of disposing of such property, or allow her to enter into contracts which at common law would be void. The judgment reported in 33 N.B. Rep. 492 reversed. *Moore* v. *Jackson*, 22 S.C.R. 218, referred to. Appeal allowed with costs.

Pugsley, Q.C., and *Teed*, for appellants. *Powell*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] MOORE *v.* CARBERRY. [July 15.

Malicious prosecution—Conspiracy—Reasonable and probable cause—Evidence of.

In an action for malicious prosecution in charging the plaintiff with conspiracy to defraud the defendant of a sow, claimed by the defendant to be his, the laying of the information, the prosecution on the charge, and the dismissal were proved, and evidence given by the plaintiff and two others charged with the offence, denying it, while the magistrate stated that in his judgment, there was no evidence to prove the conspiracy, but the evidence given before him was not produced. Evidence was also given by a neighbour that, before the charge was laid, he informed the defendant that he did not believe the sow to be the defendant's, giving the defendant his reasons therefor, though he thought the defendant honestly believed it to be his. Evidence was also given by the County Attorney that the defendant had laid a number of the facts before him, and that he had drawn up the information, and, though he stated at the trial that he did not think there was much in it, it did not appear that he had so informed the defendant.

A finding by the learned trial judge that the absence of reasonable and probable cause had not been shown was affirmed by the Divisional Court, ROSE, J., dissenting.

Blain for plaintiff. *Justin* for defendant.

Divisional Court.] RE BRITISH MORTGAGE LOAN CO. [July 15.

Municipal corporations—Assessment and taxes—Court of Revision—Appeal to County Judge—Assessor—Right to appeal.

The appeal from the Court of Revision to the County Judge in a case where such court allows an appeal against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but the appeal must be by the corporation itself.

Judgment of ARMOUR, C.J. reversed, MEREDITH, C.J. dissenting.

W. H. Blake for the loan company. *Idington*, Q.C., for the corporation.

Divisional Court.] DOUGLAS *v.* HUTCHINSON. [Aug. 1.

Libel—City Solicitor—Newspaper—Comments in, on conduct of—Belief in truth of statements published—Erroneous charge—New trial.

The discussion of the conduct of a solicitor of a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticise or make fair comments thereon, but the statements on which the criticism or comments are based must be true, and not merely believed to be true.

Where, therefore, in an action for libel for statements published in a newspaper on which comments were made criticising the plaintiff's conduct as such solicitor, the jury, although they were told that any criticism on the plaintiff's conduct must be based on the truth, were, at the same time told that it was sufficient if the statements on which the criticism was founded were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial denied.

MACMAHON, J., dissented.

Shepley, Q.C., for plaintiff. *John King*, Q.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

HENRY, J.] IN RE LAWRENCE H. MILLER.

Collection Act of 1894, c. 4—Warrant for commitment to jail—Where bad, new warrant cannot be substituted after jailor's return under R.S., c. 117.

Application for discharge of prisoner under R.S., c. 117. Prisoner was confined in jail under the warrant of a Commissioner under the "Collection Act," N.S., Acts 1894, c. 4. The warrant was in the form schedule H to the Act, and recited "that the said debtor obtained credit for the said debt without having at the time any reasonable expectation of being able to pay the same, and obtaining credit for the said debt by false pretensions or representations." The warrant had previously recited the recovery of the judgment, but did not specifically state that the judgment was recovered for a debt. The jailor having returned the warrant, *Harris*, Q.C., moved for his discharge, citing the decision of RITCHIE, J. in *Re Moore.*

Ritchie, Q.C., admitted the warrant was bad, and asked for an adjournment to file a new warrant, citing *Rex* v. *Rogers*, 1 D. & R. 156, *Rex.* v. *Taylor*, 7 D. & R. 622, *Reg.* v. *Lavin*, 12 P. R. Ont. 642.

HENRY, J., adjourned the hearing, reserving the question as to whether that course was proper, and also as to whether a new warrant could be substituted.

The matter coming on for further hearing, and a good warrant having been filed in the meantime,

Harris, Q C.—The Judge should not have adjourned the proceedings: *In re Timson*, 5 L.R. Exch. 257; Paley on Convictions, 347; Short & Mellor,

357. A new warrant cannot be substituted after return of the jailor: *Ex parte Cross*, 26 L.J.M.C. 201. The Commissioner is functus officio when he signed the first warrant: Acts, 1894, c. 4, s. 9. Assuming that a warrant can be amended where there is a good conviction there is nothing here to amend by, as the commitment and conviction are in one document, and both bad.

Ritchie, Q.C.—The new warrant holds the prisoner, and cannot be ignored. The Commissioner had power to substitute a new warrant at any time before discharge: R.S., c. 117, ss. 5, 10; *In re Phipps*, 11 W.R. 730; *Ex parte Cross*, 26 L.J.M.C. 201; *Ex parte Smith*, 3 H. & N. 227; *Reg.* v. *Turnan*, 33 L.J.M.C. 291; *Charter* v. *Graeme*, 13 Q.B. 216.

HENRY, J., held that the warrant was bad, and that he should not have delayed the discharge of the prisoner. He did not think a new warrant could be legally substituted after the return of the jailor under R.S., c. 117, 5th series. The Commissioner acting under Acts, 1894, c. 4, was functus officio when he made the first warrant. The words of R.S., c. 117, s. 10, refer to a warrant filed in another proceeding, and are not authority for substituting a good warrant for a bad one. The prisoner was discharged.

Province of Prince Edward Island.

SUPREME COURT.

HODGSON, J.] MCPHERSON *v.* MCDONALD. [Sept. 7.

Ca. sa.—Irregularity.

The plaintiff having recovered judgment issued a writ of fi. fa. to the Sheriff of Queen's Co. under which defendant's goods were sold. The Sheriff made return that he had seized and sold certain goods of defendant, but did not state that the defendant had no other goods to levy on. The plaintiff then issued a ca. sa. for the whole amount of the judgment without reference to the previous fi. fa., but in endorsing the amount due on the back of the ca. sa. credit was given for the sum realized under the fi. fa.

The defendant was committed to jail and an application was made to discharge him and set aside the ca. sa. for irregularity inasmuch as it was issued without any entry on the record of the previous fi. fa. and return and award of the ca. sa., and because it did not recite the first writ and the amount levied under it.

Held, that the ca. sa. was irregular.

Stewart, Q.C., for defendant. *McDonald*, Attorney-General, for plaintiff.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] DAY *v.* RUTLEDGE. [June 27.

Tax sale—Mortgagor and mortgagee—Purchase at tax sale by wife of mortgagor—Assignment of tax sale certificate—Purchaser for value without notice—Pleading—Joinder of causes of action—Onus probandi—Assessment Act, s. 186.

Appeal by plaintiff against the lien for taxes paid given to the defendant Lawlor by the judgment ordered to be entered at the trial before Dubuc, J., noted ante. p. 279, and appeal by the defendant Lawlor who claimed that the action should be dismissed as against him with costs. In allowing the plaintiff's appeal and dismissing Lawlor's appeal with costs, the following points were decided:

1. An objection by Lawlor to the statement of claim for multifariousness on the ground that a separate action should be brought to set aside the tax deed to him, could not succeed: *Cox* v. *Barker*, 3 Ch. D. 359; *Child* v. *Stenning*, 5 Ch. D. 695. The objection should have been to the joinder of other causes of action to an action for possession of land without leave as required by Rule 251 of the Queen's Bench Act, 1895, if in fact no such leave had been given.

2. The plaintiff was entitled to meet the defendant Lawlor's allegation of a title paramount under the tax deed and its statutory effect as evidence by showing omissions and informalities which invalidate the proceedings and to have an adjudication upon the question of title without any specific prayer for relief against the deed.

3. When the tax sale took place, the wife of the mortgagor was as free as any stranger to acquire for her own benefit any title to or interest in the land paramount to that of the mortgagee, either by using money of her own, if she had any, or by inducing a third party to advance it on her separate account, provided the transaction was not merely colorable and really carried out on behalf of the mortgagor.

4. There was not sufficient evidence of any trust as between the defendant Lawlor and the Rutledges, and for all that appears in the evidence there was an actual sale of the tax certificate and the rights conferred by it by the first assignee to Lawlor for valuable consideration, and the onus was not thrown upon him to prove that Mrs. Rutledge acted on her own account and not as agent for her husband in making the tax purchase.

5. Mrs. Rutledge's conduct after she had purchased, in concealing the fact from the mortgagee, in endeavouring to obtain an extension of time, in executing a new mortgage and in other ways, would have disentitled her to proceed with her purchase and she could not have acquired a valid title as against the mortgagee; but it does not follow that a person purchasing her apparent rights

under the tax sale certificate, for value and without notice of her special incapacity might not have acquired a title under a tax deed which would have cut out the plaintiff's mortgage.

6. To entitle Lawlor to claim protection as a purchaser for value without notice of Mrs. Rutledge's fraudulent conduct he should have pleaded this as a defence and given evidence of it, although the plaintiff had not in his pleading alleged notice to Lawlor of the concealment by Mrs. Rutledge: *McAllister* v. *Forsyth*, 12 S.C.R. 1; *Attorney-General* v. *Wilkins*, 17 Beav. 285; and as Lawlor had neither pleaded nor proved such want of knowledge and notice the plaintiff was entitled to judgment without being called upon to prove any notice to Lawlor, especially as the Court had not been asked for relief on the ground that such defence was omitted through any error or slip, and that it could be successfully raised, and the Court held that there was nothing to suggest that the defendant had been taken by surprise or misled in any way.

7. The judgment entered should be varied by striking out the clause declaring that Lawlor held as trustee for his co-defendants, and by substituting a declaration that any title to the lands in question which Lawlor took or holds under the tax sale deed is held by him subject to the plaintiff's mortgage.

8. The case does not come within section 186 of the Assessment Act, and Lawlor is not entitled to any lien on the land for the taxes paid as against the plaintiff's mortgage, and the clause in the judgment giving such lien should be struck out.

Culver, Q.C., and *Mulock*, Q.C., for plaintiff. *Ewart*, Q.C., and *Wilson* for defendant.

Full Court.] LAWLOR *v.* NICKEL. [July 9.

Bailment of goods—Sale of goods—Statute of Frauds.

Plaintiff delivered a quantity of wheat at an elevator leased by defendants whose employee agreed to purchase the wheat at "38 cents and the rise," meaning that plaintiff could take his wheat checks at any time, and get at least 38 cents per bushel, but if the market prices were higher, then he could demand the market price of the day. The wheat was received in the elevator, and receipts given for it, stating that it was received in storage for plaintiff, but as a matter of fact it was not intended that the identical grain received from plaintiff should be kept for him, the well understood course of the business being that, unless a price was agreed on, the plaintiff could only require the equivalent amount of wheat of the same grade to be accounted for to him. Plaintiff claimed the value of the wheat as if it had been sold to defendants, but it did not appear that there had been a price agreed on. Defendants disputed the receipt of three out of seven lots of the wheat delivered by the plaintiff, and paid into court a sufficient sum in payment for the other four lots.

Held, following *South Australia Insurance Co.* v. *Randell*, 6 Moore P.C. N.S. 341, that in such a case the contract between the parties is really one of sale and not of bailment, and that whether the vendor is to receive a price

in money or an equivalent quantity of grain, or has an option to do either, it is really a sale, as the property in the goods has passed to the warehouseman, and he is to pay the grain or money.

Held, also, that as the property passed to the defendants upon delivery and acceptance of the grain, it is not like a case in which specific goods are stored, the property remaining in the original holder, with an oral agreement for a subsequent sale to the bailee ; and the Statute of Frauds offers no bar to the recovery. Verdict for plaintiff for price of wheat as if sold at 38 cents per bushel affirmed with costs.

Metcalfe and *McPherson*, for plaintiff. *Wilson* and *A. C. Ewart*, for defendants.

Full Court.] REGINA *v.* HERRELL. [July 9.

Liquor License Act, ss. 151, 180, 182, 200, 209, 210—Evidence of former conviction—Amending conviction—Disqualification of magistrate—Certificate of former conviction.

Rule nisi to quash a conviction of defendant for a second offence under the Liquor License Act on the following grounds : (1) That there was not sufficient evidence of the commission of any offence under the Act, it being argued that there was no evidence to identify the liquor produced at the trial, and shown to be intoxicating, with the contents of the bottle furnished by the accused. (2) That the former conviction was not proved, there being nothing to show the identity of the defendant with the person named in the certificate produced. (3) That the convicting magistrate was disqualified to sit upon the case, as he was an honorary member of the Women's Christian Temperance Union, which had taken a great interest in enforcing the Liquor License Act, and had provided funds for that purpose.

Held, 1. Although the evidence was not satisfactory, it could not be said that there was no evidence to prove the commission of the offence, and under *Reg.* v. *Granis*, 5 M.R. 153, the finding of the magistrate could not be interfered with.

2. As the prosecution was really conducted by the town authorities, and not by the W.C.T.U., and the magistrate's connection with the society was only nominal, and he had taken no part in the conduct of its affairs, beyond having contributed $1 towards a lecture fund, it could not be said that he was disqualified to adjudicate on the case. *Reg.* v. *Deal*, 45 L.T.N.S. 439, and *Leeson* v. *General Council, etc.*, 43 Ch. D. 366, followed.

3. It was necessary to prove the identity of the defendant with the person named in the certificate of the former conviction, the similarity of names not being sufficient for that purpose : *Queen* v. *Lloyd*, 1 Cox C.C. 51, nor even the personal knowledge of the magistrate ; that the conviction must therefore be quashed. *Reg.* v. *Brown*, 16 O.R. 41, distinguished.

4. The evidence of the commission of the offence not being satisfactory, the court could not amend the conviction under sections 209 and 210 of the Act so as to make it a conviction for a first offence, because it could not be understood from it that the penalty or punishment appropriate to the offence

against the Act that had been proved had been imposed; and the powers of amendment given by ss. 883 and 889 of the Criminal Code made applicable by s. 180, of the Liquor License Act, and 56 Vict. c. 32, are to be exercised only if the Court or Judge is satisfied, upon perusal of the depositions, that an offence of the nature described in the conviction has been committed; and whilst there was here evidence to sustain the finding of the magistrate, so that if he had simply convicted as for a first offence, such conviction could not have been quashed for want of evidence, there was not sufficient in the depositions to justify the court in deciding independently that the accused was guilty and convicting him, and this should be the case to warrant an amendment.

Per KILLAM, J.: Although the certificate of the former conviction omitted the word "intoxicating" before the word "liquor" in describing the offence, yet it was not defective on that account in view of ss. 151 and 182 of the Act, and the wording of the form in schedule K. (par. 2).

Per BAIN, J.: The certificate of the former conviction was insufficient because it nowhere stated that it was under the provisions of the Liquor License Act. Rule absolute to quash the conviction.

Maclean, for the crown. *Ashbough*, for defendant.

Killam, J.] FLOUR CITY BANK *v.* CONNERY. [Sept. 22.

Summary judgment—Leave to defend—Application to sign judgment—Promissory note—Delivery of note in fraud of maker—Holder in due course.

This was an application to sign final judgment in an action on a promissory note by the indorsee against the maker. Defendant filed an affidavit stating that the note had been handed by him to one Laurie to hold in escrow until the settlement of certain accounts between him and the payee, and that it had been delivered over to the payee without his consent.

Held, that defendant was entitled to defend without showing that plaintiff was not a holder in due course. Bills of Exchange Act (1890), s. 30, s-s. 2. *Fuller* v. *Alexander*, 52 L. J. Q. B. 103, and *Millard* v. *Baddeley*, W. N. (1884) 96, followed. Application dismissed. Costs to be costs in the cause to the successful party.

Hull for plaintiff. *Dawson* for defendant.

Killam, J.] TAYLOR *v.* CITY OF WINNIPEG. [Sept. 27.

Municipality—Highway—Liability for non-repair—Negligence—Ice and snow on sidewalks.

The plaintiff's claim was for damages for an injury sustained by falling upon an icy slope which had formed on a sidewalk in the City of Winnipeg, adjacent to a public well supplied with a pump, which was daily used by a large number of people. The well was one of about sixty provided by the corporation and maintained at its expense, and a number of men were employed by the corporation whose duty it was to visit the wells from time to time during the winter and remove or reduce the mounds of ice on the sidewalks and

around the pumps caused by the freezing of the water that dripped from them or was spilled from pails while being carried away. One of these employees was on the spot on the very day of the accident and did not consider it necessary to do anything for the purpose of making the place more safe for foot passengers ; and other employees of the City, whose duty it was to report unsafe conditions, had passed the place on the same day and made no report upon it. The action was tried without a jury. The evidence for the plaintiff showed that there was a general slope of the ice from the east to the west side of the walk, that there were lumps or raised places in the ice at two different points and that the ice was very smooth and slippery at the place where the plaintiff fell, but the judge thought the witnesses had exaggerated the height of the lumps and the steepness of the slopes. He came to the conclusion also that the ice mounds and slope on the sidewalk had been caused, not from the water that dripped from the pump or was spilled in filling pails there, but by the spilling of water from the pails while being carried along the sidewalk or in the filling of other vessels, and so were the result of negligence on the part of other persons and not of any faulty construction of the pump or its approaches ; and that the place where the accident happened was not shown to have been at the time more unsafe than many other spots on the sidewalks are frequently rendered by local conditions where freezing and thawing follow each other at short intervals.

Held, following *The City of Kingston* v. *Drennan*, 27 S. C. R. 46, that the mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulations of snow or ice may amount to non-repair, for which the corporation would be liable, but it is in every such case a question of fact whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger.

2. That in the present case it would not be reasonable to hold the City liable, as there are over sixty such wells in the city, usually placed at street crossings and in constant use, and to keep the sidewalks near them completely free from ice or roughened by chopping or sprinkling sand or ashes on them would be well nigh impossible. Action dismissed with costs.

Haggart, Q.C., for plaintiff. *Ewart*, Q.C., and *I. Campbell*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Irving, J.] WAKEFIELD *v.* RIDPATH. [Aug. 31.

Jurisdiction of County Court judges—Receiver.

Application on behalf of the defendants to discharge an order made by a County Court judge in the Kootenay district (acting as a Local judge of the Supreme Court), appointing in a Supreme Court action a receiver of the Le Roi mining property. The order had the stamps of a Court order attached, but otherwise it did not appear whether it was made in Chambers or in Court.

The grounds of the application were that there is no jurisdiction for a County, Court judge to act unless it is shown that the Supreme Court judge for the district is temporarily absent, and even then there is no jurisdiction to make a Court order, and under the practice in the Supreme Court no other than a Court order could be made. It was not shown that the Supreme Court judge for the Kootenay District was absent in the sense apparently contemplated by the Act.

Held, that the order might be treated as a Chamber order, but the County Court judge had no power either under s. 44 of the County Court Act, or ss. 22 and 23 of the Supreme Court Act, or under Rule 1,075 of the Supreme Court, to make either in Chambers or in Court an order appointing a receiver in a Supreme Court action under the circumstances.

Semble, that the Supreme Court judges of Vancouver and New Westminster Districts must be absent from those districts before County Court judges in Yale and Cariboo could act as Local judges of the Supreme Court.

Daly, for plaintiffs. *Bodwell* and *MacDonald* for defendants.

Irving, J.] WAKEFIELD *v.* TURNER. [Aug. 31

Practice—Receivership order—R.S.B.C., c. 56, s. 14—Rules 517, 1,075.

Motion to set aside an order made by Judge Spinks, sitting, or purporting to sit, as a Local Judge of the Supreme Court at Rossland on August 3rd. 1898, whereby he appointed, on the ex parte application of plaintiffs, Wm. A. Carlyle, to be receiver, and to take possession of, manage and control the Le Roi mine at Rossland, and also restraining the defendants until August 13th, 1898, from interfering with the management and control of the mine, and from extracting, or disposing of any ores of the mine, or attempting to exercise any control over the operation of the mine. The operative part of the order ran "it is ordered," etc., and concluded as follows:—

(SEAL) "By the Court." "Wm. Ward Spinks,"
"J. Schofield." "Local Judge of the
"Registrar." Supreme Court."

Under s. 22 of the Supreme Court Act, B.C., and Rule 1,057, the jurisdiction of the Local Judge of Kootenay is limited to such matters as may under the Rules of Court or by statute be dealt with at Chambers. Under s. 14 of the Act, a receiver may be appointed by an interlocutory order of the Court.

Held, that the order was a Chamber order. There being no Judge resident in Kootenay or usually discharging the duties within that district, the proviso authorizing the Local Judge to hear "Court motions" has no application to Kootenay. Owing apparently to a mistake in the rules, the power which is given to the Court or Judge by the English Rules must under the B. C. Rules be exercised by the Court and not by a Judge; and so whether the order were a Court order or a Chamber order it could not be made by a Local Judge under Rule 1,075. Order discharged with costs.

Bodwell and *J. A. Macdonald*, for the motion. *Daly*, Q.C., contra.

Book Reviews.

Canadian Criminal Cases, Annototed: edited by W. J. TREMEEAR, Barrister; Toronto: Canada Law Journal Company, 1898.

The editor is to be congratulated upon the general approbation with which this work has been received by the profession. Parts 2 and 3, which are now before us, fully realize the expectations raised by the initial number. In no other department of law is the necessity for books of ready reference so much felt by the practitioner. This collection of decisions on the Criminal Code, pronounced in the various provinces, is a natural and necessary supplement to the legislation of 1892, and meets the want only partly filled by codification.

Conflict of Laws, by E. LAFLEUR, of the Montreal Bar, Professor of International Law in McGill University. Montreal: C. Theoret, Publishers, St. James St., 1898.

While this work professes to deal particularly with the Quebec law on the subject of Private International Law, yet there is much in it which will be found useful in all the Provinces. The arrangement of the subjects treated and the selection of cases to illustrate the points made are admirable. A perusal of the book recalls the curious rule as to proof of foreign law, namely, in the absence of proof to the contrary, the law of a foreign jurisdiction is presumed to be the same as ours, except as to statutory enactments, which are presumed to be different from the law of the forum.

The Science of Law and Law Making, being an introduction to law and general view of its forms and substance, and a discussion of the question of codification, by R. FLOYD CLARK, A.B. LL.B., of the New York Bar; New York: Macmillan & Co., 1898.

The object of the author in this book is to endeavour to make clear to the average reader some of the truths of law and jurisprudence and to introduce laymen to a true conception of the system of law under which they live. As the author states, it is a curious fact that no work exists in which the general outlines of legal systems are explained in popular terms, so as to be intelligible to the ordinary man not versed in technicalities. The book is, firstly, an introduction to the study of the law, and secondly, gives the groundwork on which to build up an argument on codification. It should, therefore, be helpful to those students of the law who desire to be lawyers and not merely practitioners. It exhibits much thought and research, and is written in an interesting style and clear in expression. There is entirely too little thought and time given to the study of foundational truths, such as are presented in this book, and the sooner the student is compelled to know more of the science of law and law making, the better for the profession.

The Living Age, Living Age Co., Boston, U.S.

With the first number for October, this weekly eclectic magazine which for more than fifty years has been a favourite with Canadian readers, begins a new series, and appears in a new and attractive dress. The familiar cover is to be retained, but it has been newly engraved and otherwise modernized. This is an excellent publication.

Flotsam and Jetsam.

A learned counsel in the course of a recent argument before the Court of Appeal for Ontario had occasion to dwell upon the doctrine of *ejusdem generis*, and must have been somewhat surprised on the following day to learn from the columns of a daily newspaper, that he had contended that "the just and generous" canon of construction was not applicable to the case in hand.

A letter to *The New York Evening Post* from Mr. W. R. Riddell of the Toronto Bar, calls attention to the admirable address of Mr. Choate at the meeting of the Bar Association at Saratoga, at which that most able lawyer referred to Sir Alexander Cockburn as Lord Cockburn. The letter says that, "though Lord Chief Justice, he was never a peer. Mr. Choate may plead the inveterate practice of calling Sir Edward Coke, Lord Coke, and Sir Matthew Hale, Lord Hale, but this is never followed in the case of modern judges any more than is the ancient custom of calling judges 'reverend.'"

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1898.

TUESDAY, the 17th day of May, 1898.

Present: The Treasurer and Messrs. Barwick, Bayly, Bruce, Edwards, Guthrie, Hogg, Idington, Martin, Riddell, Ritchie, Strathy, Teetzel, Watson, Wilkes, Osler and Shepley.

Mr. Strathy drew attention to the bereavement sustained by the death of D'Alton McCarthy, Q.C., and M.P., and Messrs. Osler, Idington, Shepley and Riddell were appointed to draft a resolution to record the loss of Convocation and of the profession generally.

The Secretary reported as follows: The Secretary has the honour to report, That Messrs. D. B. Maclennan, Q.C., and Colin Macdougall, Q.C., have failed to attend the meetings of Convocation for three consecutive terms, to wit Trinity and Michaelmas, 1897, and Hilary, 1898. The report was referred to the Committee on Journals and Printing.

Ordered that Mr. Ralph Hubert Dignan, a solicitor of ten years' standing, be called to the Bar in pursuance of R.S.O., c. 173, s. 2, s.s. 2. The petition of Charles Cyrus Grant, that his name be entered as a student-at-law on the books of the Law Society, from which it had been erased by order of Convocation of 4th Dec., 1896, was read. His petition was accompanied by a recommendation of practitioners of the city of St. Thomas.

Ordered, that the Secretary inform Mr. Grant that his petition was not granted.

The complaint of Dr. W. F. Meikle against Mr. J. C. Ross was read. Ordered that the Secretary do inform the complainant that the ordinary proceedings of the Court will afford him redress if he be entitled thereto, the matter complained of not being such as the Benchers can investigate. The complaint of the Fleming H. Revell Company of Toronto against Mr. A. M. Clark of Palmerston was read. Ordered that the Secretary do inform the complainants that Mr. A. M. Clark is dead and that their remedy is by suit (if they have remedy), the matter complained of not being such as the Benchers can investigate. The complaint of Mr. John McDonald of Lindsay against Mr. Hugh O'Leary was read. It appeared that the same complaint had been laid before the Convocation by his solicitor, Mr. George Ritchie, of To-

ronto on 27th June, 1894, and, at the request of Mr. Ritchie, consideration had been deferred. Ordered that Mr. Ritchie be written to and Mr. McDonald asked to account for the causes which led to the withdrawal of the complaint, and also to state in detail what has transpired since the matter came before Convocation on 27th June, 1894. The letter of Mr. Gordon Waldron, of 22nd March, relating to the complaint of Mr. D. D. Reid and Marion Reid, his wife, against Mr. John M. Godfrey, having been read, the report made by the Discipline Committee having been adopted by Convocation on the 18th February, 1898, and six members of the Discipline Committee now being present, it was with their concurrence ordered that the letter of Mr. Waldron be referred to the Discipline Committee for report.

The report of the Legal Education Committee of Nov. 16, 1897, as to Honours at the Law School and compulsory attendance at lectures, which Convocation had ordered to be taken into consideration this day, and of which special notice that the report would be then considered, was then taken into consideration. The report is as follows :—

The Principal reports to the Committee on the subject of Honours in the Third Year. At present, those who compete for Honours read only the same work as pass students, but are required to write at a second examination upon the same work. The Principal thinks that there should be some further differentiation between Honour and Pass men in this year at all events. He suggests two methods : (1) Requiring extra or substituted subjects for Honour men. (2) Requiring from Honour men an essay or thesis upon some legal subject. The Principal favours for the present the latter of these methods, apparently because, without a rearrangement of the School course, the former would add an undue burden to that now borne by Third Year men, and because in his view such rearrangement is not practicable while attendance at the School during the first year is left an optional matter. He points out very forcibly that the student who has not been well grounded in the work of the first year is not only himself insufficiently equipped for the second and third years' work, but operates as a drag upon the whole class and during the whole course. The lecturers are not able to be as progressive as they might otherwise be—the ground work neglected during the first year has to be made good during the second and third years, and subjects spread over three years that might well be disposed of in two, leaving for the Third Year extra subjects now left untouched, or substantial improvement and advance in some direction.

Your Committee invites the attention of Convocation to the whole subject. It reports in favour of a differentiation of honour from pass men in the third year at least. It prefers the scheme of extra or substituted subjects to that of an essay or thesis if such a rearrangement of the course can be made as to render the former scheme practicable. It appears to the Committee that it will be difficult if not impossible to effect such rearrangement if the Principal's advice with regard to attendance during the first year is not accepted. Your Committee thinks, however, that if such an important change is to be made it should originate with Convocation, especially in view of the careful discussion the subject received when Convocation adopted the policy which it is now suggested should be changed.

The Principal's letter to the Chairman of the Legal Education Committee accompanies this report, viz. :

TORONTO, 18th Sept., 1897.

DEAR SIR,—I desire to submit for the consideration of your Committee the following matters in connection with the School :—

1. Honours in Third Year. These are at present gained merely by answering additional questions in the different subjects ; the books read by Pass and Honour men are the same. As a practical matter it is often difficult to decide what questions are the hardest, and it is not infrequent to find that he Honour papers are considered by the men to be easier than the Pass ; this

not through any want of care on the part of the examiners. In my opinion, the men who get Honours in the final year, certainly those who are awarded medals, ought in some way to be differentiated as to work from Pass men.

This might be accomplished in two ways: (*a*) By requiring extra or substituted subjects for Honour men, such as the important subjects of corporation law or municipal law. (*b*) By requiring an essay or thesis on some legal subject of general interest on which research might be made and individual work done. I find that at Toronto and McGill Universities this is required of candidates for the first degree in law. These essays to become the property of the Law Society and to be published by it, if in the judgment of the examiners worthy of the honour. The subjects to be set, and the essays examined by special voluntary examiners, members of Convocation, or otherwise, so as to give greater importance to the subject.

Of these two plans, I am for the present in favour of the latter. Were it possible to rearrange the subjects, I should prefer the former as being on the whole the more useful to the Honour men themselves—but I shrink at present from adding any extra burden in the way of subjects to the already weighty one being carried by those who take office work in addition to that of the School. Additional subjects ought in fairness to accompany some readjustment of the curriculum, and this would probably not be possible unless my next recommendation be acceded to. In any event, I recommend that some change be made in regard to Third Year Honours.

2. Attendance in First Year I beg to suggest that the time has now come to make this compulsory on all. In some respects this year's work is the most important of all—the foundations are being carefully laid. In such subjects as Real Property and Equity the work of the second year is hampered by the fact that many of the students have not mastered the initial work in the subjects—they are ignorant of the very elements of the subjects, and the lecturers are not able to be progressive.

The effect of the non-attendance of some in the first year has an effect on the whole course; it prevents a progressive system, such as ought to be arrived at, and makes it necessary to work away year after year at the same subjects, whereas some might fairly be got through in two years, leaving for the third year either extra subjects now untouched from the very necessity of the case, or else a deeper discussion of the other important subjects in that year.

It was the unanimous opinion of the American Bar Association, at its recent meeting, that no Law School course should be under three years. We cannot honestly say that ours is a three years' course, as long as attendance is not obligatory on all for that length of time. Many of those who at present are not in attendance during the first year, are precisely the persons to whom the careful elementary teaching of legal terms and principles which is aimed at in the School is most useful and necessary.

N. W. HOYLES, Principal.

It was then moved by Mr. Riddell, seconded by Mr. Bayly: That Convocation approve of the principle that all law students shall attend the Law School for a full course of three years and that it be referred to the Legal Education Committee to formulate a scheme to carry out this principle and report to Convocation. Moved in amendment by Mr. Watson, seconded by Mr. Hogg: That the subject of the letter of the Principal, as to attendance upon lectures, be referred to a special committee consisting of Messrs. Martin, Idington, Hogg, Shepley, Guthrie and Strathy, for consideration and enquiry, after reference to such sources of information as they may think proper, and to report thereon to Convocation at the meeting on the 28th June.

The amendment was lost on the following division: Yeas, Messrs. Idington, Wilkes, Hogg, Watson and Guthrie.—5. Nays, Messrs. Shepley, Martin, Edwards, Teetzel, Bruce, Bayly, Strathy, Riddell and Barwick.—9. The main motion was then carried on the some division.

It was then moved by Mr. Watson: That the Reporting Committee be

asked to report to Convocation as to the time taken by the printer and publishers to print and issue the reports of the Law Society after the same are placed in their hands, giving date of receipt in some cases and date of distribution by the publishers; also to report specially as to the reporting and publication of the decisions of the Master in Ordinary, especially in Winding Up cases under the Dominion Winding Up Act, and to say why these decisions are not included in the regular reports. Ordered accordingly.

The Special Committee appointed in relation to the resolution regarding the death of the late D'Alton McCarthy presented the following repo r t: "That the Benchers of the Law Society of Upper Canada in Convocation assembled desire to express their profound sorrow at the death of their late fellow of the Bench, Mr. D'Alton McCarthy, Q.C., M.P. That Convocation record on the minutes its sense of the great loss sustained by the Benchers, the Bar and the country generally through the death of Mr. McCarthy, whose professional d eminence, as well as his fearless and conscientious discharge of public duty, have earned the admiration and esteem of all That a copy of this resolution be engrossed and transmitted to the widow and family of the deceased, with whom the Benchers sympathize in their deep affliction."

The report was adopted and it was ordered that the same be communicated to the widow and family as in the report expressed.

Mr. Bruce from the Committee on Journals presented the following report: The Committee on Journals and Printing having taken into consideration the order of Convocation in Hilary Term, referring to this committee to report on the propriety of establishing a system for giving notice to members of the business to be laid before Convocation, beg to report that there is no necessity for giving such notice unless where specially ordered by Convocation.

The report was received and ordered to be taken into consideration on 28th June next.

Mr. Martin moved that Mr. W. H. Cross be appointed auditor for the ensuing year. Carried.

Mr. Watson, from the Finance Committee, presented the following report: That they have considered the application of Messrs. Jarvis and Vining, solicitors, for a refund of the annual fees paid by them on the 21st of September last on behalf of Mr. W. J. Clark, solicitor, of London, now deceased. The Committee beg to state that as the fees were payable on the 15th November and Mr Clark was then practising and remained practising until the time of his confinement to his house, which occurred on 4th December, they are unable to recommend any refund of the fees, as the rule is against any such being made. The report was adopted.

Mr. Bruce, from the Committee on Journals and Printing, reported: That the Committee confirm the report of the Secretary as to the absence of Messrs. D. B. Maclennan, Q.C., and Colin Macdougall, Q.C., from the meetings of Convocation. Ordered that the report be taken into consideration on the 3rd June next, and that Messrs. Maclennan and Macdougall be notified of the report, and of the time when same is to be taken into consideration.

It was moved by Mr. Bruce, seconded by Mr. Watson, that the committee who had charge of the painting of the portrait of the Honourable Sir George Burton, Chief Justice of Ontario, be requested to communicate with the artist with a view to the improvement of the likeness. Carried. Convocation rose.

SATURDAY, 21st May, 1898.

Present: The Treasurer and Sir Thomas Galt, Messrs. Bayly, Martin, Ritchie, Shepley and Watson.

Mr. Martin moved, seconded by Mr. Shepley, that Mr. Irving be elected Treasurer for the ensuing year. Carried.

Ordered that the Chairmen of the several standing committees for the past year be a Special Committee to report to Convocation list of members to form the standing committees for the ensuing year.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report on applications for relief, and recommended as follows: That Mr. W. D. Henry be permitted to write at the Supplemental Examination of the Third Year. That Mr. G. G. Moncrieff be allowed to write at the Supplemental Examination of the Third Year. That Mr. F. H. Hurley be allowed to write at the Supplemental Examination of the Third Year. That Mr. T. A. Burgess be allowed to write at the Supplemental Examination of the First Year. That Mr. C. H Bradburn be allowed to write at the Supplemental Examination of the First Year in the subject of contracts. That Mr. G. M. Kelley's notice for call, being late, do remain posted until the 3rd June inst. That Mr. G. F. Macdonnell's service under articles be allowed as sufficient. That Mr. I. R. Carling's service under articles be allowed as sufficient. That Mr. J. R. Graham be required to place himself under articles until the first day of Trinity Term. That Mr. C. B. Labatt be admitted as a student-at-law of Graduate Class.

Convocation adopted and ordered the several recommendations.

The Secretary reported that in fulfilment of the order of Convocation of the 17th inst. in the matter of the complaint of J. Macdonald against W. H. O'Leary, he had written to Mr. Geo. Ritchie asking him to explain, and then read Mr. Ritchie's reply. Ordered that the further consideration of the complaint be deferred until the first day of Trinity term next. The letters of Mrs. Geo. Kydd to the Secretary, of the 22nd April, 30th April and 18th May, 1898, were read, and no complaint being thereby disclosed, no minute is now necessary.

Mr. Watson moved, seconded by Mr. Bayly, that Mr. Shepley be re-elected representative of the Law Society on the Senate of the University of Toronto for the ensuing year. Carried. The Secretary was directed to inform the Registrar of the University of the election of Mr. Shepley to represent the Law Society on the Senate of the University.

The Special Committee appointed to strike the Standing Committees for the ensuing year reported a list. The Committee further reported that on the following Standing Committees, viz.: Reporting, Discipline and Journals, they had left two vacancies, and in respect to these vacancies asked leave to report on some future occasion.

The report was adopted and the Special Committee further charged to report again as they proposed.

The complete list of the Committees for the year 1897-1898, after filling the vacancies, will be found in the proceedings of Convocation on the 28th June, 1898.

FRIDAY, the 3rd June, 1898.

Present, the Treasurer and Messrs. Aylesworth, Bruce, Clarke, Martin, Osler, Robinson, Shepley and Watson.

Convocation entered into consideration of the report of the Committee on Journals and Printing of 17th May last, and no cause having been shown, the report was adopted. Convocation then ordered a call of the Bench for Tuesday the 28th day of June, to elect Benchers in the place of Messrs. Colin Macdougall and D. B. Maclennan. Convocation then ordered that there be a call of the Bench for the same date, 28th June, for the election of a Bencher to fill the vacancy caused by the death of the late D'Alton McCarthy.

Upon the report of the Legal Education Committee, presented by W. Shepley, it was

Ordered that Mr. G. M. Kelley be called to the Bar.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report upon the results of the Third Year Examination held in Easter, 1898, and thereupon it was

Ordered that the following gentlemen who have passed the examination and have duly attended the required number of lectures, be called to the Bar and do receive their certificates of fitness as solicitors:—W. J. O'Neil, W. M.

Griffin, J. Montgomery, W. F. Bald, H. Hartman, C. B. Nasmith, J. Campbell Elliott, A. G. Slaght, H. A. Clark, E. J. Daly, A. A. Bond, Wilson McCue, C. H. Porter, A. M. Chisholm, G. F. Macdonnell, D. R. Dobie, T. A. Hunt, G. L. T. Bull, C. A. Macdougall, J. C. Hamilton, E. H. McLean, W. L. McLaws, J. A. MacInnes, R. W. Eyre, W. M. Charlton, M. J. Kenny, E. H. McKenzie, J. A. Philion, D. P. Kennedy, I. R. Carling, I. E. Weldon.

And that the following gentlemen who have also passed the examination but have failed to attend the required number of lectures, such failure having been certified by the Principal of the Law School to be due to illness or other good cause, be also called to the Bar and do receive their certificates of fitness as solicitors :—E. A. Dunbar, G. McCrea, C. W. Cross, T. J. Rigney, J. B. Noble, C. H. Pettit, E. T. Buck.

And further that Messrs. W. J. O'Neail, M. W. Griffin and J. Montgomery be called with honours, and that Mr. O'Neail do receive a silver medal and Mr. Griffin do receive a bronze medal.

The following named gentlemen were then introduced and called to the Bar: Mr. R. H. Dignan, a solicitor of ten years' standing, who had been on the 17th of May last ordered for call, and Mr. G. M. Kelley. Also the following named gentlemen who had been previously reported as having passed the Law School Examination, and had been ordered for Call, were then introduced and called to the Bar: W. J. O'Neail, with honours and silver medal; M. W. Griffin, with honours and bronze medal, and J. Montgomery, with honours, also W. F. Bald, H. Hartman, C. B. Nasmith, J. Campbell Elliott, H. A. Clark, A. A. Bond, Wilson McCue, C. H. Porter, A. M. Chisholm, E. A. Dunbar, G. F. Macdonnell, G. McCrea, C. W. Cross, T. A. Hunt, G. L. T. Bull, T. J. Rigney, J. A. MacInnes, R. W. Eyre, W. M. Charlton, C. H. Pettit, M. J. Kenny, E. H. McKenzie, J. A. Philion, I. E. Weldon.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report on applications for relief and recommended as follows: That Mr. J. D. Ferguson be allowed to write at the Supplemental Examination in September, in place of the Easter Examination. That the notices for admission given by Messrs. W. Cain and E. M. Meighen do remain posted until the half yearly meeting, and if no objection then appear, they be admitted as students-at-law as of Easter Term. That the following gentlemen be admitted as students-at-law of the Graduate Class: E. E. Craig, J. A. Jackson, C. S. Wilkie, W. M. Ewart, W. A. Grange, G. H. Wilmer, and the following of the Matriculant Class: R. S. Colter, J. E Metcalfe, C. A. Irvine and H. A. Rose. Mr. Shepley, on behalf of the Committee, stated that the reports on the first and second year examinations of the Law School had not been considered, the Examiners' reports having not been completed, and asked permission to report on these examinations at the half yearly meeting.

Mr. Shepley read the report of the Principal of the Law School on the work done during the past session; the report was referred to the Legal Education Committee.

Mr. Osler read the quarterly letter of the editor of the Reports upon the state of the reporting:

27th May, 1898.

DEAR SIR,—I have to report that the work of reporting is in a forwaid state. In the Court of Appeal, in addition to the cases in which judgment was delivered this month, there are eleven judgments of March, all ready to issue. In the High Court Mr. Harman has twelve cases unreported, two of March (revised), nine of April (two of which have been revised), and one of May. Mr. Lefroy has five, of which four are April judgments, and one of May. Mr. Boomer has eight, of which three are of March (revised), and five of April. Mr. Brown has one, of April. There are four Practice cases unreported, all of May.

J. F. SMITH.

(Concluded in next Issue.)

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The use of electricity for industrial purposes gives rise to many interesting and practical questions. One of these was recently decided in the Supreme Court of the District of Columbia, and is referred to in a recent issue of the *Albany Law Journal*. It appears that the plaintiff, one Danenhauer, was the proprietor of a hotel in Washington, and also a subscriber of the Chesapeake & Potomac Telephone Co. The litigation arose on an attempt by the company to remove the telephone, on the plea that plaintiff allowed guests to use it. The judge before whom the case came held that an hotel telephone must be used strictly for legitimate hotel business, and for the private business of the proprietor; that it might also be used for the benefit and accommodation of guests in connection with their position as guests, but was not to be used by them for any purposes of a purely private character. This decision appears to lay down a reasonable rule, which will commend itself to the common sense of the public, and will doubtless be satisfactory to the telephone companies.

THE CANADIAN FISHERIES APPEAL.

In the current number of the *Law Quarterly Review* will be found some interesting comments upon the recent Fisheries Appeal by the learned author of "Legislative Power in Canada." The passage singled out for criticism is the remark that "if the legislature purports to confer upon others proprietary rights where it possesses none itself, that in their lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91" (of the British North America Act). These words are considered by Mr. Lefroy

to be wholly irreconcilable with the principle that the legislative powers granted by the British North America Act are "as plenary and as ample within the limits prescribed as the Imperial Parliament in the plenitude of its power possessed and could bestow."

I am not unmindful of the unpleasant consequences which a controversy with an expert upon his own ground is apt to entail. *Impar congressus Achilli.* But after a perusal of the ingenious arguments which Mr. Lefroy has adduced in support of his position, I own that I cannot help feeling very strong doubts whether the sentence quoted can, when construed reasonably and with due reference to the context, be regarded as fraught with the very grave significance which is ascribed to it. A brief recital of some of the considerations which have given rise to these doubts will form the subject of the following article.

The effect of the principle laid down by Lord Herschel may, if I understand Mr. Lefroy's position aright, be stated thus: The Dominion and Provincial Legislatures may be said to "possess" the property vested in the Crown as represented by the Dominion and Provincial, but neither legislature possesses the property of individuals. Therefore the Privy Council, in declaring that the power to confer proprietary rights exists only where such rights are possessed by the legislature itself, virtually renounces the principle laid down in several of its earlier decisions, that the powers of the Canadian legislatures are plenary.

The vice of this reasoning would seem to consist in the assumption that, under any circumstances, which it is here necessary to take into consideration, a legislature can be said, in the strict technical sense of the word, to "possess" any property whatever. Normally the control exercised by a legislature over property is not accompanied by that present and subsisting *physical* power which, according to the authorities, is an essential element of possession: See Sweet's Law Dictionary, sub voc. "Possession." In this regard I cannot see that there is any distinction between the property of the Crown and the property of individuals. The dominion wielded

over property by the lawmaking agents of a State is, as we ordinarily think of it, limited to determining, within the prescribed jurisdictional limits what rights shall exist with respect to the various kinds of property under their authority. That authority may be extensive enough to enable them to shift, by their mere fiat, the possession of property from the State to the individual, or from the individual to the State, or from one individual to another, but through all these transmutations from one possession to another, the legislature will always be an entity outside of, and distinct from, the actual possessor of the property. It is not intended of course to deny that such a body may specially provide that certain property should pass into its own possession. But it would be idle, in the present connection, to consider the effect of such an exceptional transaction.

If this view is correct, it would seem that Mr. Lefroy should have cut much deeper in his criticism than he has done. Instead of taking it for granted that "possession" might in some cases be predicated of the control exercised by a legislature, he should at the very outset have joined issue with Lord Herschel upon this point by calling in question the correctness of his Lordship's terminology. Until other authorities are produced for this use of the word "possesses" with respect to the ordinary exercise of its functions by a legislature, it appears not unreasonable to suppose that that eminent jurist has inadvertently fallen into a verbal blunder, and that the control to which he was referring was rather that which finds its active exercise in laws declaring to whom proprietary rights shall belong than that which amounts to "possession," properly so called. One reason for adopting this view is that it will enable us to escape the very formidable difficulties involved in the hypothesis that the Privy Council intended to overthrow by a sort of side-wind the doctrine which it had previously laid down as to the plenary powers of the Canadian legislatures.

The real meaning of Lord Herschel's words I believe to be merely this—that the inference of an excess of power by the Dominion Parliament in the given case necessarily

followed from the fact that it was undertaking to confer proprietary rights in regard to a subject matter which the British North America Act did not authorize it to control *to this extent.* It is clear that, as the power of Provincial Parliaments to make laws respecting property and civil rights is exclusive under that Act (sec. 92, sub-sec. 13), the Dominion Parliament can possess a like power only in cases in which it has been expressly given by section 91, or some other power has been conferred which is of such a nature that its exercise necessarily involves the creation of proprietary rights in favour of the Dominion. For example, the former predicament arises under sub-sec. 1, the latter under sub-secs. 9, 11, 24, 28. All that the Privy Council now decides is that sub-sec. 12 is not one of those which fall into the second category.

The principle announced by Lord Herschel therefore, so far from being inconsistent with the doctrine as to plenary legislative powers, applies that doctrine in the only form in which it can be applied in a country of co-ordinate legislatures, both deriving their authority from the same source, and each supreme within the jurisdictional domain allotted to it. Obviously the legislative powers conferred upon any of the Canadian Parliaments, whether Dominion or Provincial, can be regarded as plenary only in so far as their exercise will not derogate from or trench upon the exclusive powers reserved to some other Parliament. In other words, that totality of plenary legislative power which must be lodged somewhere in every self-governing state is in Canada portioned out among several law-making bodies. Whether the Dominion Parliament, or one of the Provincial Parliaments, is to exercise any given part of that totality of power, is a question to be settled, as in the case under review, by a reasonable construction of the organizing statute. It is manifest, in fact, that, under any other theory of the constitution, the effect of the section of the Act which declares certain powers to be lodged exclusively in one or other of these Parliaments would be completely nullified.

This conception of the distribution of the entire sum of legislative jurisdiction among several bodies is, we imagine,

quite adequate to explain the point of view of the Privy Council when it gave utterance to the proposition quoted by Mr. Lefroy (p. 390) from the judgment in *Dobie* v. *The Temporalities Board.* Plenary power over proprietary rights created by any of the legislatures is there considered to be vested in that legislature alone, the authority of other legislatures being confined to regulation, the nature of which will necessarily vary according to the nature of the property. The only difference in the practical application of this principle in the case of the Dominion Parliament and of a Provincial Legislature will be that which results from the fact that the jurisdiction of the former extends over the whole of Canada, while the jurisdiction of the latter is confined to a certain territorial area.

If this line of ratiocination is followed out it will be difficult to agree with Mr. Lefroy in his argument (p. 388) that, as "the Provincial Legislature no more possesses the property of individuals in the Province by virtue of their legislative jurisdiction over property and civil rights than the Dominion Parliament by virtue of its legislative jurisdiction over sea-coast and inland fisheries, the conclusion would seem to force itself upon one that neither the Dominion Parliament nor Provincial Legislatures could pass an act granting a fishing lease or license upon the land of private individuals in Canada." If it is assumed that the term "possession of proprietary rights" is incorrect in its application to a legislature, and that the only control such a body normally exercises over those rights is to declare the circumstances under which they shall be created, modified, transferred, or extinguished, it would seem that the case in question is completely provided for by the provision of the British North America Act, which authorizes the Provincial Legislatures to make laws as to "property and civil rights." This power is given without any restriction or limitation, and must therefore be so far plenary in its nature as to validate even an Act which has the effect of cutting down private rights in realty. And even if I am in error as to the meaning of the phrase "possession of proprietary rights," I venture to think it is a matter of some doubt whether, in view of the enabling pro-

vision just referred to, the Privy Council would, as a matter of course, hold that the principle laid down as to the Dominion Parliament is equally applicable to a Provincial Legislature.

The further difficulty suggested by Mr. Lefroy that Lord Herschel's doctrine involves the corollary that the expropriation clauses of the Railway Acts are invalid, will cease to appear formidable, if it is remembered that the right of eminent domain is one inherent in every State. Railway companies are permitted to take land and other property for the reason that, although they are in some respects private corporations, they are, in an enlarged view of their functions, acting as agents of the public in the creation and operation of a certain description of highway. It follows, therefore, that the question, in what cases the right of expropriation may be exercised by them, is one which is wholly independent of the extent of the power of the legislature to make ordinary laws affecting the property of individuals. Such exercise must, upon perfectly familiar principles of statutory construction, be valid wherever the legislature, Dominion or Provincial, has acted within the scope of its powers in authorizing the building of that particular railway for which the land is to be taken. In other words it must be assumed that the British North America Act in granting the power of making laws in regard to railways, has by implication granted the power to derogate from the proprietary rights of persons who may hold land along the lines of such railways. Whether the Dominion or a provincial legislature is to be regarded as the grantee of this implied power in any given case depends upon the construction of the Act itself (s. 92, s.s. 10), 10), which fixes the limits of their respective fields of jurisdiction. It is not unworthy of notice in this connection that sub-division *c* of the section referred to, is apparently quite adequate to obviate the deadlock, which Mr. Lefroy suggests (pp. 389, 390) as a result of the possible determination of a provincial legislature to play "dog in the manger," and interpose obstacles to the building of a line serviceable to the other parts of the Dominion.

Upon the whole, therefore, I am inclined to think that the

sentence criticized by Mr. Lefroy, if at first sight it appears to justify his description as "a bolt out of the blue" for constitutional lawyers, will be found, upon a closer examination, to be pretty much of a "brutum fulmen," so far as any revolutionary consequences are concerned.

C. B. LABATT.

OBITER DICTA.

"E'en on the groaning table of the Law
We've kickshaws—cultured palates else were damned."

—ANON.

To the lawyer whose sympathies are with the welfare of the "Establishment" in the mother country in these distempered days—with Parliamentary menaces on the one hand and Kensit brawlings on the other vexing her peace—it is comforting to read what Erskine May (Cons. Hist., Vol. II, p. 455) said of the Church of England, in even more parlous times than these in her history: "The fold of the Church has been found wide enough to embrace many diversities of doctrine and ceremony. The convictions, doubts and predilections of the 16th century still prevail with many of later growth; but enlightened Churchmen, without absolute identity of opinion, have been proud to acknowledge the same religious communion—just as citizens divided into political parties are yet loyal and patriotic members of one State." It remains to be said, however, that the ritualists are losing sight of the via media of the old Tractarian school.

* * *

Notwithstanding our honest desire to do justice to the memory of Sir Edward Coke, we are continually having our dislike kindled against him by meeting with examples of his mean jealousy and caddishness such as the following:—Being presented with an autograph copy of the *Novum Organum* (*Instauratio Magna*), he wrote under the great philosopher's autograph:

"Auctori consilium.
Instaurare paras veterum documenta sophorum,
Instaura legis justitia que prius;"

while over the device of the ship passing under the pillars of Hercules he inscribed the sorry couplet:—

> "It deserveth not to be read in schools,
> But to be freighted in the ship of fools."

However, it seems to be quite in accord with the eternal fitness of things that Bacon should be roasted by Coke, and that, all the better for such roasting, the former is eaten and digested and absorbed by living souls, while the latter, its usefulness being gone, is relegated to the ash heap of forgetfulness.

* * *

We trust that we may be pardoned in venturing to express our satisfaction that the views we briefly expressed in January last as to Sir Henry Maine's status in the pantheon of English jurists are shared by so capable a critic as Mr. Woodrow Wilson. We claimed that to Maine belongs the honour of being the first to bring about an enlightened investigation by English lawyers of the history and philosophy of jurisprudence. In the course of a most instructive monograph upon Maine in the September Atlantic Monthly, entitled "A Lawyer with a Style," Mr. Wilson thus speaks of the great jurist's didactic quality: "It was his suitable part in the world to clarify knowlege, to show it in its large proportions and long significance to those who could see. His mind was an exquisitely tempered instrument of judgment and interpretation. It touched knowledge with a revealing, almost with a creative power, and as if the large relationships of fact and principle were to it the simple first elements of knowledge." The faculty of rendering a theme transpicuous was Maine's punctum saliens as a teacher, and his gift in its fulness is possessed by none of his successors.

* * *

Apropos of lawyers who possess literary style, we recall a remark once made by a reviewer, in the late lamented, but singularly brilliant, "Chap-Book," to the effect that Blackstone and Sir William Jones were the only stylists to be found in the whole literature of the law. When we ventured to

demonstrate the painful incorrectness of this very sweeping declaration by quoting the names of Maine, Pollock, Maitland, Kent, Story, Greenleaf, Holmes, and some others, who have enriched the domain of pure literature both in England and America by their treatises upon the law, our reviewer answered, with the most sublime inconsequence, "but wasn't Maine something more than a mere lawyer?" As if, forsooth, all of the names above enumerated do not belong to men whose intellectual stature it is not possible to measure by any standards within the ken of the "mere lawyer."

* * *

It is such an appalling event as the recent assassination of the Empress of Austria that gives us pause in lauding the great moral advancement of our time. Shakespeare's remark that "uneasy lies the head that wears a crown" has much greater force in these end-of-the-century days than in the period when it was uttered. What are we to do with Anarchism? It would seem that capital punishment is not the Hercules able to destroy this modern hydra. Its devotees revel in their "martyrdom" for the mistaken cause which they seek to further by such inhuman deeds. To do the rulers of mankind to death, and to die for such exploits, has become a religion with them. Capital punishment has no terrors for such madmen; on the contrary it but stimulates their appetite for assassination. Anarchism is a festering sore on the body of our civilization, which penologists may well exercise their skill in attempting to cure.

* * *

Prompted thereto by the latest fin de siécle performance of a certain English judge, our office-boy has handed us the following as a suggested epitaph for this unrivalled jurist when Providence calls him to the court of last resort:—

> Here lies a quondam Darling of the Bench,
> Who judged a Frenchman bad in worser French.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act).

NEGLIGENCE—PUBLIC BODY—CONTRACT TO EXECUTE WORKS FOR PUBLIC BODY—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR—PAYMENT INTO COURT BY CO-DEFENDANT.

Penny v. *Wimbledon Council* (1898) 2 Q.B. 212, is one of that class of cases, in which an employer is held liable for the negligence of his contractor. The action was against a municipal corporation and its contractor for the repair of a highway, to recover damages for the negligence of the contractor in carrying out his contract, by leaving a heap of soil and grass on the road unlighted and unprotected, over which the plaintiff fell and injured herself, in the dark. The action was tried before Bruce, J., who held that the corporation, having control of the works, were liable for the negligent acts which their contractor had committed. Another question in the case was one of practice arising on the fact that the defendants delivered separate defences both denying liability, and the contractor paid into Court £75 in satisfaction of the plaintiffs' claim. This payment was referred to in the defence of the corporation, who alleged that the money so paid in was sufficient to satisfy the plaintiffs' claim. The damages of the plaintiff having been assessed at £50, the question was, whether any, and what, judgment could be awarded against the corporation. Bruce, J., held that though they could have joined with their co-defendant in the defence of payment into Court, so as to have made it available for them both, yet as they had not done so, but had chosen to deliver a separate defence, they could not therein avail themselves of the payment into Court by their co-defendant; the defence of the corporation, he therefore held, simply amounted in law to a denial of liability, and as on that defence they had failed, he gave judgment against them, as the damages had been obtained from the other defendants, simply for costs.

STATUTE OF LIMITATIONS—MONEY CHARGED ON LAND—DERIVATIVE MORTGAGE—PAYMENT OF INTEREST BY CO-DEBTOR—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57). S. 8—(R.S.O., C. 133, S. 23)—21 JAC. 1, C 16. S. 3—THE MERCANTILE LAW AMENDMENT ACT, 1856 (19 & 20 VICT., C. 97). S. 14.

Barnes v. *Glenton* (1898) 2 Q.B. 223, is a decision of Lord Russell, C.J., on a point arising on a defence of the Statute of Limitations, and upon which it would seem that in Ontario the Courts might possibly come to a different conclusion. The facts were tolerably simple. The plaintiffs lent the defendants, who were trustees, money on the security of a mortgage, to which they were beneficially entitled, and which they procured to be assigned by their trustees to the plaintiff. This assignment contained no covenant by the defendants for the repayment of the money advanced; nor were they parties to it; but by a contemporaneous deed, to which they were parties, it was agreed that the money advanced should be a first charge on the mortgage money assigned, and that the plaintiffs would not realize the mortgage without first giving the defendants an opportunity to redeem. This deed also contained no express covenant for repayment of the advance. In 1882 Lewis, one of the defendants, retired from the trust, but the other trustees continued to make payments in respect of the amount advanced, until 1897, when the action was commenced to recover from the defendants the balance remaining due. The action, so far as appears from the report, was not to realize the money out of the mortgaged land, but simply to enforce the claim against the defendants personally. The defendant Lewis contended that there being no covenant for repayment of the moneys advanced, the plaintiff's action was barred as against him in 1888, under the joint effect of 21 Jac. 1, c. 16, and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 14, whereby payments by one joint debtor are insufficient to keep the debt alive as against another joint debtor. Lord Russell, C.J., was of opinion that this defence could not prevail, but that the plaintiff's claim was for money charged on land, and was therefore within the Real Property Limitation Act, 1874, s. 8 (see R.S.O., c. 133, s. 23), and being

within that section, he also held that the claim was unaffected by the other Statutes of Limitations above referred to. It is on this latter point that it is possible a different view may be taken by the Courts in Ontario, due, in part, to the difference in the wording between the Real Property Limitation Act, s. 8, and R.S.O. c. 133, s. 23, the latter reading "No action or other proceeding shall be brought *to recover out of any land*," the words italicized not being in the English Act. In Ontario the personal liability of the debtor, and the liability of the land have, we believe, been considered as distinct, and not necessarily conterminous, nor governed by the same statute of limitations: see *Allan* v. *McTavish*, 2 A.R. 278; *Boice* v. *O'Loane*, 3 A.R. 167.

STATUTE—CONSTRUCTION—"TRANSMIT."

Mackinnon v. *Clark* (1898) 2 Q.B. 251, furnishes a judicial construction of the word "transmit" when used in a statute. The action was to recover a penalty. The statute in question required a candidate at an election to "transmit" within a specified time to the returning officer a return of his expenses, and it was held by the Court of Appeal (Smith, Rigby and Williams, L.JJ.) that "transmit" meant "send"; and that the depositing of the return in the post office within the time named, was a sufficient compliance with the statute, though the return did not actually reach the returning officer till after the time limited for its transmission had expired.

LANDLORD AND TENANT—PROVISO FOR RE-ENTRY.

Horsey Estate v. *Steiger* (1898) 2 Q.B. 259, was an action by a landlord to recover possession under a proviso for re-entry. The proviso in question was to take effect if the lessees, a joint stock company, "shall enter into liquidation, voluntary or compulsory." The lessees were solvent, but voluntarily entered into liquidation for the purpose only of reconstruction with additional capital. Hawkins, J., however, was of opinion that this constituted a liquidation within the meaning of the proviso, and that the plaintiff was therefore entitled to possession as claimed.

INNKEEPER—GUEST—LOSS OF PROPERTY.

In *Orchard* v. *Bush* (1898) 2 Q.B. 284, the plaintiff sued the defendant, an innkeeper, for the loss of his coat; and the question argued was whether under the circumstances of the case the plaintiff was a "guest" in the defendant's inn. The plaintiff was on his way home from business, and went into the defendant's hotel, and entered the dining room to get a meal. He put his overcoat in the place where coats were ordinarily kept, and when he had finished his meal, it was missing. Sleeping accommodation was provided for those guests who required it, but the evidence showed that a great many people used the hotel for dining there only. Wills and Kennedy, JJ., held that there was sufficient evidence to establish the relationship of innkeeper and guest, so as to make the defendant liable without any proof of negligence on his part. Wills, J., says, "I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night."

TRADE MARK—FALSE DESCRIPTION, APPLICATION OF—ORAL STATEMENT—DESCRIPTION IN INVOICE AT PURCHASER'S REQUEST—CRIMINAL LIABILITY OF MASTER FOR ACT OF SERVANT.

Coppen v. *Moore* (1898) 2 Q.B. 300 and 306, are decisions turning on the English Merchandise Act, 1887 (50 & 51 Vict., c. 38), which differs somewhat from the R.S.O. c. 166, s. 6, but which may, nevertheless, be of some utility in considering the construction to be placed on the latter Act. The case arose upon a prosecution for selling goods to which a false description was applied, and in the case stated by the justices it appeared that the prosecutor asked a salesman in the accused's shop for an English ham; the salesman pointed to some American hams, and said "These are Scotch hams." The prosecutor chose one, and asked for an invoice containing a description of the ham bought, and was given one, stating the purchase of a "Scotch" ham. It was held by Wright and Darling, JJ., that the oral statement that the ham was Scotch did not amount to a breach of the Act, but the statement in the invoice was an application of a false

description to the goods sold, within the meaning of the statute; but they reserved the question of whether the employer was liable for the act of his servant, for the consideration of the Court for Crown Cases Reserved. On this point it appeared that the employer was not present at the time of the sale; that he had issued a printed circular to his employees, forbidding the sale of the hams under any specific name or place of origin, but there was evidence that the American hams were dressed so as to deceive the public; on the strength of which it was found that the employer had not taken all reasonable precautions against committing an offence against the Act, and the Court (Lord Russell, C.J., Jeune, P.P.D., Chitty, L.J., Wright, Darling and Channell, JJ.) therefore held that under the circumstances the employer was criminally responsible for the act of his servant, as he had not discharged the onus of showing that he had acted innocently. On this point Lord Russell says, "We conceive the effect of the Act to be to make the master a principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants, in all cases within the section with which we are dealing, when the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility when he can prove that he had acted in good faith, and done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

NUISANCE—FENCE ADJOINING HIGHWAY—INJURY TO CHILD USING HIGHWAY—PROXIMATE CAUSE OF—LIABILITY OF OWNER OF FENCE.

Horrold v. *Watney* (1898), 2 Q.B. 320, has some resemblance to the recent case of *Smith* v. *Hayes*, 29 O.R. 283, but it had the additional element of nuisance, which seems to have been wanting in *Smith* v. *Hayes*, and which enabled the plaintiff to succeed in the action. The plaintiff was an infant of four years, who was passing along a highway bounded by the defendant's fence, and being attracted by the

noise of some boys at play on the other side of the fence he clambered up it to see what was going on; the fence being in a rickety condition, fell upon the plaintiff and injured him. One line in the judgment of A. L. Smith, L.J., covers the whole ground, "a rotten fence close to a highway is an obvious nuisance." This, coupled with the extreme youth of the plaintiff, was held by the Court of Appeal (Smith, Rigby and Williams, L.JJ.), to be sufficient to entitle him to recover upon the authority of *Lynch* v. *Nurdin*, 1 Q.B. 29.

COSTS—PAYMENT INTO COURT—ACCEPTANCE IN SATISFACTION—DEFENDANT'S SUBSEQUENT COSTS—ORD. XXII. R. 7—(ONT. RULE 423)

Lomer v. *Waters* (1898) 2 Q.B. 326, is a decision on a simple point of practice. The defendant after defence, and after the action had been entered for trial, paid into Court a sum in satisfaction, which the plaintiff accepted, and requested the defendant to consent to the case being struck out of the trial list, but which he refused, except upon an undertaking to pay the defendants' costs, incurred subsequent to the payment in, which the plaintiff declined to give. The cause came on for trial, when Darling, J., made an order for the defendant to pay the plaintiff's costs up to the date of the payment into Court, and for the plaintiff to pay the defendant his costs subsequently incurred: but the Court of Appeal (Smith, Chitty and Williams, L.JJ.) held that there was no jurisdiction to order the plaintiff to pay the defendant's costs.

GAMING—BET ON HORSE RACE—ILLEGAL CONSIDERATION 9 ANNE, C. 14—GAMING ACT, 1835 (5 & 6, W. 4, C. 41), S. 1

In *Woolf* v. *Hamilton* (1898) 2 Q.B. 337, the plaintiff sued to recover the amount of a cheque given in payment of a bet on a horse race. The plaintiff was indorsee of the cheque, with notice of the consideration for which it had been given. 16 Car. 2, c. 7 and 9 Anne, c. 14, made all such securities null and void, but the Gaming Act, 1835, repealed these Acts so far as it made the securities void, and enacted that they should be deemed to have been given for an illegal consideration, and the result of that Act was to prevent the plaintiff

from recovering, he having become the holder with notice of the illegality. The judgment of Darling, J., dismissing the action, was therefore affirmed by the Court of Appeal (Smith, Williams and Rigby, L.JJ.) 16 Car. 2, c. 7, would seem to be still in force in Ontario. This case again suggests the desirability of having a careful revision of the Imperial statute law of England prior to 15th Oct., 1792, with a view to accurately determining how much of it is still in force in Ontario. Many statutes then in force in England, have since been repealed there, but still remain in force in Ontario, and if there is any value of certainty in the law, it is surely desirable that a volume should be compiled giving in an authoritative shape the Imperial Statutes which it is desirable to retain, and formally repealing those that should be repealed, so far as Ontario is concerned. The work of the English Statute Revision Commission ought to facilitate this being done without much trouble, or any very great expense.

PARTIES— PRACTICE — ACTION BY ONE OF TWO JOINT PROMISEES — REFUSAL OF OTHER TO JOIN AS PLAINTIFF -JOINT PROMISEE AS DEFENDANT.

In *Cullen* v. *Knowles* (1898) 2 Q.B. 380, a well recognized principle of equity practice is established as being a proper method of procedure under the Judicature Act. The action was brought by one of two joint promisees to recover a debt, but the other joint promisee refused to join as plaintiff in the action, though tendered an indemnity against costs; and he was therefore made a defendant. It was contended that the action was improperly constituted and would not lie; but Bigham, J. held that the Equity practice on this point was applicable and that the action was properly framed.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Que.] GRAND TRUNK R. W. CO. *v.* COUPAL. [June 14.

Railways—Eminent domain—Expropriation of lands—Arbitration—Evidence—Findings of fact—Duty of appellate court—51 Vict., c. 29 (D.).

On an arbitration in a matter of the expropriation of land under the provisions of The Railway Act, the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (TASCHEREAU and GIROUARD, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Lafleur, for appellant. *Lafontaine*, for respondent.

SMITH *v.* ST. JOHN CITY RY. CO. CONS. ELECTRIC CO. *v.* ATLANTIC TRUST
N.B.] CO. CONS. ELECTRIC CO. *v.* PRATT. [June 14.

Appeal—Costs—Consolidation of suits—Discretion of Court appealed from.

On the hearing of a suit in Equity before PALMER, J., late Judge in Equity for New Brunswick, he directed said suit and two others involving similar issues to be consolidated. No order for consolidation was taken out, and separate interlocutory decrees were afterwards issued in the three suits. The hearing subsequently proceeded before another judge, who held that the suits had been consolidated, and directed the costs to be taxed on that basis. The Supreme Court of New Brunswick having affirmed this order, an appeal was taken to this Court.

Held, that it is only when some fundamental principle of justice has been ignored, or some other gross error appears, that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs, and this was not a case of the kind. Appeal dismissed with costs.

Pugsley, Q.C., for appellants. *W. Cassels*, Q.C., *Stockton*, Q.C., and *Tilley*, for the several respondents.

PROVINCES OF ONTARIO AND QUEBEC *v.* DOMINION OF CANADA.
IN RE COMMON SCHOOL FUND AND LANDS.

Constitutional law—B.N.A. Act, s. 142—Award of 1870, validity of—Upper Canada Improvement Fund—School Fund—B.N.A. Act, s. 109—Trust created by—Effect of Confederation on.

The arbitrators appointed in 1870, under s. 142 of the B.N.A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the provinces of Ontario and Quebec, representing

the former Province of Canada. In dealing with the Common school fund established under 12 Vict., c. 20 they directed the principal of the fund to be retained by the Dominion, and the income therefrom paid to the provinces.

Held, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore intra vires of the arbitrators.

Held, further, that there was a division of the beneficial interest in the fund, and a fair adjustment of the rights of the provinces' in it, which was a proper exercise of the authority of the arbitrators under the statute.

By 12 Vict., c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold, and the proceeds applied to the creation of the Common school fund provided for in section 1. The lands so set apart were all in the present province of Ontario.

Held, that the trust in these lands created by the Act for the common schools of Canada did not cease to exist at confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the Common schools of the new provinces of Ontario and Quebec.

In the agreement of reference to the arbitrators appointed under Acts passed in 1891, to adjust the said accounts, questions respecting the Upper Canada improvement fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two provinces, up to January, 1889.

Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the school lands, as the amount of which was one of the items in the accounts rendered.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] HANNUM *v.* MCRAE. [Oct. 4.

Contempt of court—Witness—Local manager of bank—Production of bank books—Disclosure of bank accounts—Inconvenience—Privilege—Motion to commit—Service of papers.

The local manager of a chartered bank was subpœnaed to attend as a witness before a Master upon a reference in an action to which neither he nor the bank was a party, and there to produce the books of the bank, and give evidence. The testimony sought was relevant to the matters in question in the action, and no party thereto objected to its being adduced, nor to the means by which it was sought to be obtained. Upon appeal from an order, made upon a motion to commit the witness for his contempt in refusing to produce the books or give evidence of their contents, requiring him to attend at his own expense and do so :

Held, that inconvenience to the bank was no ground for refusing to pro-

duce the books. Unless exempted by legislation, a banker is not excused from producing his books, or testifying as to his customer's balance, when relevant to the issue. Discussion of the English Bankers' Books Evidence Act, 1879.

Prima facie the custody and control of the books of the branch of which he was manager fell within the scope of the witness' duty, and it was incumbent upon him to make it clear that he was expressly forbidden to produce them.

If a subpœna duces tecum is served upon an officer who has the absolute control and the ability to produce, he must do so. *In re Dwight and Macklem*, 15 O.R. 148, approved and followed.

Evidence as to a customer's account is not privileged at common law, and s. 46 of the Bank Act is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts, save by a director. Even if the prohibition of the directors would justify nonproduction, it would not protect the witness from speaking the facts within his knowledge. Where a motion to commit is made, it is not, in this Province, necessary to serve with the notice of motion copies of the affidavits on which it is based. *Hannum* v. *McRae*, 33 C.L.J. 722, 17 P.R. 567, affirmed.

Travers Lewis, for appellant. *Watson*, Q.C., and *Latchford*, for respondent.

HIGH COURT OF JUSTICE.

Ferguson, J.
Trial of actions. } [Sept. 6.

SUTHERLAND MINES CO. *v.* TOWNSHIP OF ROMNEY.

Drainage by-laws—Municipal Act—Registration—Motion to quash—R.S.O. 1897, c. 223, s. 396 (1).

Held, that the provisions of 55 Vict., c. 42, s. 351, (O.), as amended by 60 Vict., c. 45, s. 7, sub-s. 1, and s. 47 (R.S.O. 1897, c. 223, s. 396 (1)), with reference to registration of by-laws creating debts, apply to drainage by-laws.

Semble, also, that a by-law so registered and not attacked, and the certificate registered within the term prescribed is valid and binding, even though one which the municipality had not proper power to pass.

Atkinson, Q.C., and *G. Douglas*, for plaintiff. *Aylesworth*, Q.C., and *Rankin*, for defendants.

Ferguson, J., Robertson, J., Meredith, J.] [Sept. 8.

RE LEAK AND TORONTO.

Municipal corporation—"Injuriously affecting" lands—Arbitration with landowner—Award—Compensation—Interest on.

Interest may be allowed by an arbitrator on the amount of compensation awarded to a landowner against a municipality for injuriously affecting his lands in the exercise of its powers.

Per ROBERTSON, J. : The act causing the injury is not tortious or illegal, and compensation is not to be treated as damages.

Per MEREDITH, J.: The municipality is not a wrong-doer, and, therefore, it is not a case of assessing damages for a wrong done.

Per FERGUSON, J.: Interest should not be allowed upon mere unascertained damages, and damages in respect of lands "injuriously affected" are damages of that character.

Re McPherson and the City of Toronto (1895) 26 O. R. 558 referred to.

Judgment of STREET, J., reversed. FERGUSON, J., dissenting.

Armour, C.J., Falconbridge, J., Street, J.] [Sept. 12.

RE GUINANE.

Assignment for benefit of creditors by one member of firm—Examination of manager as agent, clerk, servant, officer, or employee of assignor—R.S.O. 147, s. 34.

A manager of a firm composed of two partners comes within the designation "agent, clerk, servant, officer or employee" in s. 34 of R.S.O., c. 147, and is examinable as such, although the assignment is made by one partner only, and the partnership had been dissolved previous to the assignment. Judgment of Meredith, C.J., reversed.

Clute, Q.C., for the assignee. *W. J. Boland*, for the manager.

Armour, C.J.] REGINA *v.* GIBSON. [Sept. 12.

Police magistrate—Summary trial before—Court of record—R.S.O., c. 83—Habeas corpus.

The defendant was charged before the police magistrate for the city of Hamilton with the offence of procuring females for immoral purposes, an offence triable at the General Sessions of the Peace, but elected to be tried summarily, and was tried by the magistrate, and by him convicted and sentenced to imprisonment and fine. An application for a habeas corpus was made under R.S.O., c. 83, which provides for the issue of such a writ where a person is confined or restrained of his liberty, except persons imprisoned for debt or by process in any action, or by the judgment, conviction, or order of a Court of record, Court of Oyer and Terminer, or General Gaol Delivery, or Court of General Sessions of the Peace.

Held, that the words "a Court of record" are intended to include only Superior Courts or principal Courts of record, and do not include any Courts of record inferior to or less principal than the High Court of Justice: *Gregory's Case*, 6 Co. 20 b.; *O'Reilly* v. *Allen*, 11 U.C.R. 526. If all Courts of record had been intended, there would have been no necessity for adding "Court of Oyer and Terminer," etc., for these were all Courts of record: *Regina* v. *St. Denis*, 8 P.R. 16, and *Regina* v. *Goodman*, 2 O.R. 468, not followed, the liberty of the subject being involved.

J. Dickson, for defendant.

Boyd, C., Robertson, J.] MAGANN *v.* FERGUSON. [Oct. 4.

Money in court—Payment in with defence—Election to take out—Time—Extension—Judgment—Rules 353, 419, 424.

A defendant brought money into Court with his defence under Rule 419,

in full satisfaction of one of the alleged causes of action. The plaintiff did not elect to take the money out of Court within the time limited by Rule 424, and judgment was given in favour of the defendant upon the cause of action in respect of which the money was paid in. The judgment did not dispose of the money in Court.

Held, that it remained in Court subject to the final order of the Court after the determination of the action, and must be disposed of in accordance with such determination. The plaintiff, having elected to take the money out within the proper time, was not entitled, after judgment, to have the time extended by an order nunc pro tunc, under Rule 353.

J. T. C. Thompson, for plaintiff. *Rowell*, for defendant.

Boyd, C., Robertson, J.] ARTHUR & CO., LTD. *v.* RUNIANS. [Oct. 5.

Discovery—Production of documents—Application before statement of claim—Pleading—False representations.

Production of documents should not be ordered to a plaintiff before he pleads, unless the judge is satisfied that the documents called for are essential to the statement of the plaintiffs' claim. In an action for damages for false representations made by the defendants whereby the plaintiffs were induced to supply them with goods and money, and to enter into agreements with them, to the plaintiffs' loss :

Held, that it was enough for the plaintiffs to aver in their statement of claim that the goods and money were supplied on the faith of statements, oral and written—specifying them—falsely and fraudulently made ; and this they could do without the production of the defendants' balance sheets, books of account, etc. If particulars were afterwards claimed, it would then be time enough to apply for discovery.

F. E. Hodgins, for the plaintiffs. *Swabey*, for the defendants.

Rose, J.] REGINA *v.* GIBSON. [Oct. 6.

Criminal law—Procuring female for prostitution—Commitment—Recital of invalid conviction—Duplicity—Criminal Code, ss. 185, 800.

A commitment of the defendant to gaol recited a conviction for "unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere."

Held, that the commitment was bad on its face, as it recited a conviction which was invalid for duplicity and uncertainty. The commitment alleged a conviction, and might have been supported under s. 800 of the Criminal Code, if there was a good and valid conviction to sustain it. The conviction returned was that the prisoner, at H., etc., did unlawfully procure a girl of seventeen years, I. D., to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the prisoner at L., in the State of New York, one of the United States of America.

Held, not a good and valid conviction, because it did not come within any of the provisions of s. 185 of the Code.

Wallace Nesbitt, for prisoner. *J. R. Cartwright*. Q.C., for the Crown.

Robertson, J.] REGINA *v.* PONTON. [Oct. 7.

Venue—Change of—Criminal cause—Fair trial—Evidence as to.

Upon a motion made by the Crown under s. 651 of the Criminal Code to change the venue for the trial of three persons charged with the offence of breaking into a bank in the town of Napanee, and stealing money therefrom, from the town of Napanee to some other place, upon the ground that the sympathy felt for two of the accused in the town, and in the county of Lennox and Addington, of which it is the county town, was such that a fair trial could not be had,

Held, that the rule that all causes should be tried in the county where the crime is supposed to have been committed ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county; and mere apprehension, belief, and opinion, are not to be relied on as evidence. And, under the circumstances appearing upon affidavits filed, the motion was refused.

L. G. McCarthy, for Crown. *Wallace Nesbitt*, for defendant Ponton. *C. J. Holman*, for defendant Mackie. *W. E. Middleton*, for defendant Holden.

Boyd, C., Robertson, J.] DAWSON *v.* LONDON STREET R. W. CO. [Oct. 8.

Discovery—Examination of officers of street railway company—Conductor and motorman.

In an action for damages for bodily injuries sustained by a pedestrian, as alleged, by reason of the negligent management and operation of a car of the defendants, an incorporated company:

Held, that the conductor and motorman of the car were officers of the company examinable for discovery; but as the plaintiff had already examined the general manager, she should, under Rule 439 (2), not be allowed to examine both the conductor and motorman, but only one of them.

W. J. Harvey, for the plaintiff. *Hellmuth*, for the defendants.

Falconbridge, J., Street, J.] LAZIER *v.* HENDERSON. [Oct. 8.

Landlord and tenant—Assignment for benefit of creditors—Future rent—Preferential lien—Distress—R.S.O., c. 170, s. 34.

By the terms of a lease of shop premises, the rent was payable quarterly in advance. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors. There was a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable, and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable.

Semble, that the latter part of the proviso was in fraud of creditors and void.

Held, that the expression "arrears of rent due for three months following the execution of such assignment," in s. 34 of the Landlord and Tenant's Act, R.S.O., c. 170, means "arrears of rent becoming due during the three months following the execution of such assignment;" and the landlord was, therefore, apart from the proviso, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment.

Held, also, that the expression "the preferential lien of the landlord for rent," in s. 34, has the same meaning that it had under the Insolvent Acts; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment, which were subject to distress, although there was no actual distress

E. G. Porter, for the plaintiff. *V. J. Hughes*, for the defendant.

Rose, J., MacMahon, J.] SMYTHE *v.* MARTIN. [Oct. 10.

Pleading—Statement of claim—Extension of claim made in writ of summons—Rule 244.

An appeal by the defendants from an order of ARMOUR, C.J., in Chambers, reversing an order of one of the local judges at Windsor, whereby part of the statement of claim was struck out, and restoring such part. The writ of summons was indorsed with a claim for an injunction to restrain waste. The statement of claim went further, and claimed to recover possession of the land in respect of which the injunction was sought.

Held, that what was claimed by the pleading was an "extension" of what was claimed by the writ, within the meaning of Rule 244. *United Telephone Co.* v. *Tasker*, 59 L.T.N.S. 852, and *Cave* v. *Crew*, 41 W.R. 359, 3 R. 401, distinguished. Appeal dismissed with costs to the plaintiff in any event.

F. C. Cooke, for defendants. *H. Cassels*, for plaintiff.

Armour, C.J.] IN RE YOUNG. [Oct. 11.

Infants—Custody—Paternal right—Maternal right—Separation of family.

Application by Andrew Young, upon the return of a writ of habeas corpus, addressed to Maggie Young, his wife, and William Taylor, her father, for an order for the delivery of the applicant's seven children, the eldest of whom was fifteen years old, to him, and upon the petition of Maggie Young, their mother, for an order awarding her the custody of such children.

Held, on the evidence, that the father was guilty of adultery with a woman, a servant in his own house, and was also guilty of making loose and unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and unkind, and at times cruel to her and them.

Held, that the provisions of R.S.O., c. 168, recognize the maternal right, as well as the paternal right, and require equal regard to be paid to the wishes of the mother as to those of the father, differing from the English statute in this respect, and rendering the decisions thereunder to some extent inapplicable here. The result of this is that where the wishes of the mother are

opposed to those of the father, the principal matter to be considered is the welfare of the children. It certainly could not be for the welfare of such of the children as were under five years, that they should be removed from the custody of their mother; and that being so, it was impossible to give the custody of any of the children to the father, for it is wrong to separate the children: *Warde* v. *Warde*, 2 Ph. 786; *Re Ellerton*, 25 Ch. D. 220; *Smart* v. *Smart*, (1892) A.C. 425. Order made that the mother should retain the custody of the childen, and that the father should have access to them at such times as might be agreed upon, or in case of failure to agree at such times as should be fixed by the Chief Justice. Costs to be paid by the father.

L. F. Heyd, for father. *J. H. Moss*, for mother and maternal grandfather.

Armour, C.J.] IN RE HENDERSON AND CITY OF TORONTO. [Oct. 15.

Municipal corporation—By-law—Registration—Non-conformity with plans—"Instrument"—Notice.

Motion by James Henderson to quash by-law 3519, of the corporation of the city of Toronto, being a by-law "to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Rosedale Valley road, between Yonge street and the River Don, in Ward 2, for the cost of opening the said street." By-law 2164 provided for the opening of the Rosedale Valley road, and one of the grounds upon which it was sought to quash by-law 3519, was that by-law 2164 was never registered, and the road was therefore never validly opened, and no assessment could be made for its cost. By-law 2164 was passed on the 27th July, 1888, and the law then, as now, was that "every by-law passed since the 29th March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road, or highway has been, or is opened upon any private property, shall, before the same becomes effectual in law, be duly registered:" R.S.O. 1887, c. 184, s. 547. A duplicate original of by-law 2164, certified under the hand of the clerk and the seal of the city corporation, was received at the proper registry office on the 22nd August, 1888, and a $2 fee for registry was then and there paid, but it was never registered or entered in any of the books of the registry office, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R.S.O. 1887, c. 114, s. 84, s.-s. 2.

Held, that this by-law came within the prohibition of the last mentioned enactment, for the reason assigned by the registrar, and also because the by-law was an "instrument" within the meaning of that section, and as defined by section 2 of the Act. Section 96 of R.S.O. 1897, c. 136, must be read with section 100 of the same Act, and so reading it the effect of section 100 is not diminished, for this by-law was not, under the circumstances, capable of registration. And the by-law, never having been registered, never became effectual in law for any purpose. The provision for the registration of such a by-law did not at first appear in any Registry Act, but in a Municipal Act, 29 & 30 Vict., c. 51, s. 348, and it is not to be qualified by holding that the registration is only required for the purpose of notice under the registry laws. And this by-law

never having become effectual in law, never had any force or validity whatever, and nothing done under it could be justified by it; and therefore by-law No 3519 had no foundation and must be quashed.

F. E. Hodgins, for motion. *Fullerton*, Q.C., and *Caswell*, for city.

Meredith, C.J.] ECKHARDT *v.* LANCASHIRE INS CO. [Oct. 17.

Fire insurance—Variation from statutory conditions—"Co-insurance clause" "Not just and reasonable"—R.S.O., c. 203, s. 171.

The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for $15,000, "subject to seventy-five per cent. co-insurance"—these last words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink among the variations of the statutory conditions, as follows: "The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the companp shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of $42,120.17, the cash value of the property insured being $115,000, and the whole amount of the insurance upon it, including the $15,000 named in the defendants' policy, $70,000. The defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than tbe latter, but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy.

Held, following *Wallace* v. *Lancashire Ins. Co.*, 23 A.R. 224, that the "co-insurance" clause was a condition and a variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of section 171 of the Ontario Insurance Act, R.S.O., c. 203, it was binding on the insured.

W. Cassels, Q.C., and *Anglin*, for the plaintiffs. *Osler*, Q.C., and *McInnes*, for defendants.

Meredith, C.J.] WARD *v.* CITY OF TORONTO. [Sept. 23.

Lessor and lessee—Covenant for renewal—Compensation for improvements—Notice.

Where a covenant in a lease to the effect that if at the expiration of the term the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days notice in writing of this desire, the lessors would renew at a rental to be fixed as therein directed, provided that if the lessors did not see fit to renew the lessee should receive compensation for his permanent improvements.

Held, that in order to get the benefit of the proviso it was necessary tha

the defendants should make their election not to renew before the expiration of the term.

Wallace Nesbitt, for plaintiff. *Fullerton*, Q C., for defendants.

DIVISION COURT.

COUNTY OF OXFORD.

Finkle, Co. J.] MASTERS v. ADAMS. [Oct. 22.

Master and Servant Act—Set off—Jurisdiction of Police Magistrate outside of cities.

This was a summary proceeding under the Master and Servant Act, in which the Police Magistrate of the town of Woodstock found forty dollars wages due to the servant, but allowed a set off of three dollars to the master. On appeal to the Division Court from this judgment.

Held, that a Police Magistrate outside of cities has no jurisdiction under the Master and Servant Act to allow counter claim or set off against the servant.

J. G. Wallace, for appellant. *S. G. McKay*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Vanwart, J.] GUNTER *v.* EDGECOMBE [Sept. 24.

Slander—Particulars—Order for, when made.

Action of slander. The declaration alleged that the defendant had falsely and maliciously spoken certain words of the plaintiff, setting them out, with an innuendo for larceny. After appearance the defendant applied for an order for particulars on his own affidavit, which stated he had no recollection whatever of ever using or speaking to the plaintiff or to any other person or persons the words alleged in the declaration, or of the time, place or to whom or of the circumstances under which such words were spoken.

Ordered that the plaintiff deliver to the defendant or his attorney an account in writing of the particulars showing where, and the persons to whom, the alleged slander in the declaration was spoken and published, but need not state the names of persons within hearing or passing at the time to whom the words were not addressed. The following cases were cited: *Wicks* v. *MacNamara*, 3 H. & N. 568; *Early* v. *Smith*, 12 Ir. Com. Law Rep. 35 Q.B.: *Bradbury* v. *Cooper* (1883) 12 Q.B.D. 94; *Roselle* v. *Buchanan* (1886), 16 Q B.D 656; *Gourand* v. *Fitzgerald* (1889) 37 W.R. 55; *Stern* v. *Sevastopulo* (1869) 14 C.B. N.S. 738.

Vanwart Q.C., for plaintiff. *W. McCready*, for defendant.

McLeod, J.] KANE *v.* KERRIGAN. [Sept. 24.

Criminal law—Abusive language—Breach of the peace—Place of offence—25 Vict., c. 17, s. 9 (N.B.).

By the above Act a penalty may be imposed "upon any person who shall by insulting or abusive language or behaviour, taunting epithets or threatening gestures, attempt to provoke another person to commit a breach of the peace in any public street, thoroughfare, alley, road, or by-road, or in any building, or whereby a breach of the peace may be occasioned." Defendant having been convicted under a by-law framed under the Act, for having used abusive language in a field fronting on a highway,

Held, that the offence must occur in a place named in the Act.

Mullin, for appellant. *Skinner*, Q.C., and *Ashe*, for respondent.

McLeod, J.] FRIGEAU *v.* COLLET. [Oct. 10.

Pleading—Signature of counsel—60 Vict. c. 24, s. 97.

Where plea was signed by attorney and not by counsel, and plaintiff relying upon the English practice treated the plea as a nullity and signed judgment, the judgment was set aside, and leave given to amend the plea, the defect being held to be an irregularity at most, and the English practice distinguishable.

Carter, for plaintiff. *Davis*, for defendant.

Barker, J.] CITY OF FREDERICTON v. MUNICIPALITY OF YORK. [Oct. 18.

Market place—Erection of scales—Crown grant—Abridgement of grant by statute—Construction of statute.

By crown grant, dated in 1817, the defendants' predecessors in title, were granted a block of land fronting on a public street "for a public market place." From that date until 1874 weigh scales were in use in front of the market building for weighing hay, straw and bulky articles, and were used in connection with the market. In 1874 the scales were voluntarily removed. In 1857, by 20 Vict., c. 17, s. 3, it was enacted that the land described in the grant "shall forever hereafter be under the sole control of the county council of the County of York, and their successors, and shall be used as a . . . street and square for the said . . . market house, and for no other purpose whatever. By s. 4 nothing in the Act "shall in anyway affect public rights." In 1898 the defendants began the erection of weigh scales in front of the market, and on land included by the grant, which erection it was now sought to restrain by injunction.

Held, that by 20 Vict., c. 17, the land in front of the market was not made a public street with the effect of making the proposed erection a nuisance as an encumbrance thereon, and that the right under the grant to erect the scales as part of the equipment of the market was not abridged by the Act.

W. Van Wart, Q.C, for plaintiff. *Black* and *Bliss*, for defendants.

Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] HUTCHINSON *v.* COLBY. [Sept. 27.

Appeal from County Court—Practice—Abandonment of right to appeal—"Amount in question" in appeal.

Motion on behalf of plaintiff to strike out an appeal by defendant to the full court from an order of a County Court judge, dismissing a summons to set aside the writ of attachment issued in this action.

Plaintiff sued to recover $70.70, and issued a writ of attachment. Defendant took out a summons to set aside the writ of attachment, which summons was dismissed by the County Court judge on July 23rd, 1898. No order was then taken out, and the case went to trial, when judgment was entered for plaintiff for $47.70. This, however, was set aside on defendants' application, and a new trial granted, when judgment was entered for plaintiff for $65.70. Defendant, before the second trial, took out the order dismissing the application to set aside the writ of attachment, and appealed therefrom to the full court, when plaintiff moved before a judge to strike out the appeal on the following ground: That the defendant was estopped from appealing by reason of her proceeding with the trial of the action after the order dismissing the summons was made, by calling and examining witnesses and by applying for a new trial after the order had been made. That defendant acted on the order by issuing and taking out the same; by proceeding with a new trial and calling and examining witnesses; that defendant abandoned the order by neglecting to serve same upon the plaintiff or his solicitor within a reasonable time. That at the time the defendant commenced her proceedings in appeal the amount in question did not exceed the sum of $50, and the appeal should have been to a single judge.

Held, that the motion should be dismissed with costs, to be costs to the defendant upon the appeal in any event of the appeal. It could not be said that the defendant had acted on the order. She was throughout defending herself against the whole proceeding. The judge's decision was against her contention that the attachment should not have issued. The time for the trial had been fixed before the application to set aside the attachment was disposed of, but even if it had not, and if the defendant had sought afterwards to speed the trial in order to get rid of the attachment, it should not be considered that she was acting upon the order dismissing her application. It could not be said that she abandoned the order by not serving it. The order was against her and she could not abandon it. As to whether the appeal should have been to the full court or a single judge, so far as there can be said to have been an amount in question on the application to set aside the attachment, it was more han $50 when that application was pending, and it did not appear that this was altered by a judgment for a less amount which had been set aside when the appeal was entered.

Leech, for plaintiff. *Bonnar*, for defendant.

Killam, J.] MERCHANTS BANK *v.* MCKENZIE. [Oct. 3.

Fraudulent conveyance—Voluntary settlement—Statute of limitations—Evidence of parties to impeached transaction.

The plaintiffs brought this action to have it declared that certain lands held by the defendant McKenzie, and for which she had certificates of title under The Real Property Act, were held by her as trustee for the defendant McLean, against whom the plaintiffs had a registered judgment, or were transferred to her in fraud of McLean's creditors, and to enforce the judgment against the lands. These lands were vested in McLean in the year 1885, but were in that year sold for taxes to certain parties from whom the defendant McLean afterwards negotiated purchases of their rights under the tax sale certificates in the name of the defendant McKenzie, his niece, who kept house for him, and who had no money of her own. It was sought to be shown at the trial that McLean owed Miss McKenzie for wages about as much money as was required for the purchases, and had taken this way of paying off his indebtedness to her. It was not distinctly proved, however, that this had been done in consequence of any bargain or arrangement as to the matter, and McLean provided a considerable further amount to get the deeds from the municipality at the expiration of the time for redemption, after which certificates of title were procured for the lands in the name of Miss McKenzie.

Held, following *Barrach* v. *McCullough*, 13 K. & J. 117, and *Harris* v. *Rankin*, 4 M.R. 115, that the onus was upon Miss McKenzie to account for her possession of the money she claimed to have had and to have advanced in the purchases, and for the source from which the balance of the purchase money was derived, and that in the absence of satisfactory evidence upon these points, the Court should treat the purchases as made by McLean, and with his own money.

No evidence was given at the trial of any agreement that the land should be taken by Miss McKenzie for her claim, or in part payment, or as security for it, or that the purchase price furnished by McLean should be credited on account, and whether the transaction should be considered as one of voluntary settlement upon Miss McKenzie, or of a trust in McLean's favor; it was void against creditors, and the certificates of title in the name of Miss McKenzie could not stand in the way of granting relief to the plaintiffs.

Held, also, that the plaintiffs were not barred by the Statute of limitations, as the case should be treated as one of concealed fraud, and the fraud was not discovered, and could not by the exercise of reasonable diligence have been discovered, more than ten years before the commencement of the action. Judgment declaring that the plaintiffs are entitled to a lien upon the lands for the amount of their judgment, interest and costs, and to a sale of the property.

Tupper, Q.C., and *Phippen*, for plaintiffs. *Ewart*, Q.C., and *McPherson*, for defendants.

Bain, J.] LOPPKY V. HOFLEY. [Oct. 7.

County Court—Jurisdiction of—Prohibition—Unsettled account.

This was an application for prohibition to a County Court, under the fol-

lowing circumstances: Defendants in 1894 ordered a bill of lumber from th plaintiff, amounting to $615. This lumber was supplied, and afterwards a further quantity was ordered. Payments were made on account of the $615 order, some of which were after the second order was given. The plaintiff's claim in the action was limited as he contended to the lumber supplied on the second order. Defendant pleaded "never indebted." On the cross examination of the plaintiff at the trial, the order for $615 was mentioned, and defendant's counsel contended that the account sued on was a part of an unsettled account exceeding $600, that the two orders for lumber constituted a running account, and that some of the items charged in the account sued on were included in the $615 order. The County Court judge found that the $615 order was a separate transaction, and had been settled, and that the account sued on was a different account and had never been settled. After some evidence had been given, the trial was adjourned, when the defendant moved for prohibition.

Held, that it was competent, and indeed necessary, for the judge to inquire into and decide the facts which would determine the question of jurisdiction, and as the County Court judge had decided the facts in favour of jurisdiction, the Court above should not interfere by reviewing his decision, except under very exceptional circumstances. *Joseph* v. *Henry*, 19 L.J.Q.B. 368, and *Elston* v. *Rose*, L. R. 4, Q. B. 4 followed. Application dismissed with costs.

Wilson, for plaintiff. *McKerchar*, for defendant.

Bain, J.] WINNIPEG *v.* C. P. R. CO. [Oct. 15.

Municipality—Construction of contract—Municipal taxes do not include school taxes.

This was a demurrer to the plaintiff's replication in an action commenced before the coming into force of the Queen's Bench Act, 1895, against the defendants for school taxes levied upon their property. Defendants had pleaded exemption under a by-law of the city, passed in 1881, by which it had been enacted that all property of the defendants then or thereafter to be owned by them for railway purposes within the city should be exempt for ever from all municipal taxes, rates, levies and assessments of every nature and kind. The replication simply set out the by-law in full.

Held, that school taxes are not included in the term "municipal taxes" and that under section 135 of the Assessment Act, R.S.M., c. 101, as amended by 57 Vict, c. 21, s. 3, the plaintiffs had a right to sue for them, being merely constituted by the legislature as the agents through whom the school corporation levies the amounts they require for education purposes. Judgment for plaintiffs on the demurrer.

Howell, Q.C., and *Campbell*, Q.C., for plaintiffs. *Aikins*, Q.C., and *Culver*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Walkem, J.] E. & N. RAILWAY CO. *v.* NEW VANCOUVER COAL CO. [June 3.

Practice—Pleading—Embarrassing statement of claim—General allegation of plaintiffs' title—Rule 181.

Summons to strike out the following paragraph of the plaintiffs' statement of claim as embarrassing: "The plaintiffs are the owners and occupiers of certain lands known as Newcastle Townsite, and of the foreshore rights in respect thereof, situate on Vancouver Island, and are the owners of the coal under the foreshore and sea opposite the said lands, and of the exclusive right of mining and keeping for its own use all coal and minerals under the said foreshore and sea opposite the said lands." The plaintiffs, who had never been in possession sued to recover certain coal seams, and the above paragraph of the statement of claim contained the only allegation as to how the plaintiffs claimed title.

Held, following *Phillips* v. *Phillips*, 4 Q. B. D. 127, that the defendants were entitled to full particulars of the title under which the plaintiffs claimed. Ordered that plaintiffs amend statement of claim by giving particulars within five weeks. Costs to be costs in the cause.

E. V. Bodwell, for plaintiffs. *Gordon Hunter*, for defendants.

ESQUIMALT ELECTION CASE.

Martin, J.] JARDINE *v.* BULLEN. [Oct. 5.

Election petition—Practice—Case stated—R.S.B.C., c. 67, s. 231, s.-s. 8.

Summons by petitioners that that portion of the case raised by the petition which alleged that the Returning Officer erroneously received certain ballot papers as votes for the respondent which were not marked according to law, and erroneously rejected certain ballot papers properly marked according to law as votes for David William Higgins, and which further alleged that the said David William Higgins was duly elected, be stated as a special case. Numerous charges of bribery and corruption were also set forth in the petition. S.-s. 8 of s. 231, of the Provincial Elections Act is as follows: "Where, upon the application of any party to a petition, made in the prescribed manner to the Court, it appears to the Court that the case raised by the petition can be conveniently stated as a special case, the Court may direct the same to be stated accordingly, and any such special case shall, as far as may be, be heard before the Court, and the decision of the Court shall be final; and the Court shall certify to the Speaker its determination in reference to such special case." Had the application been successful, the effect of it would have been to obtain a recount. It was objected on behalf of the respondent that the Court was not empowered under the section to do otherwise than to state the whole case.

Held, that where the case raised by an election petition embraces several distinct grounds of complaint, the Court has no power to state only one part of the case.

Duff, for the summons. *Hunter*, contra.

Martin, J.] [Oct. 19

NEW VANCOUVER COAL CO. v. ESQUIMALT & NANAIMO RAILWAY CO.

Practice—Interlocutory injunction—Undertaking as to damages.

Motion for an order for an injunction restraining the defendants, their servants, workmen and agents from proceeding under the arbitration proceedings of the Coal Mines Acts, R.S.B C., c. 137, for the purpose of acquiring the right of way through the property of the plaintiffs in Nanaimo District, and for an injunction restraining the defendants, their servants, &c., from trespassing on the said property of the plaintiffs, under colour of the said Act or otherwise. On October 3rd an interlocutory injunction was granted until the hearing, but as counsel for the defendants asked that the plaintiffs should give an undertaking as to damages, and counsel for the plaintiffs submitting that it was not the practice of the Court to require such undertaking in cases where the interlocutory injunction had been obtained on notice, but only when ex parte, and further, that in any event the Court should exercise its discretion and dispense with the undertaking in the present case, the point was reserved for further argument.

Held, that an undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made ex parte, but even when it is made upon hearing both sides.

Helmcken, Q.C., for plaintiffs. *Luxton*, for defendants.

EXCHEQUER COURT.

ADMIRALTY DISTRICT.

McColl, C.J.] COOK *v.* MANAUENSE. [Oct. 14.

Maritime lien—Arrest—Practice.

The plaintiff alleged breach of a contract for his passage from Liverpool, England, to St. Michael, and thence by steam launch and house boat to the Yukon gold fields. The contract was also that he should be supplied with provisions during the open season of 1898, if he remained in touch with the steamer and the steamer's boats, should be carried back to Victoria at the end of the season. The breach complained of was the failure to carry the plaintiff from St. Michael to Dawson. The contract was made with Captain Edwards, the master and owner of the ship, which was subject to a mortgage. The plaintiff claimed the condemnation and sale of the ship, and the application of the proceeds to the payment of the damages claimed, and costs. The action was brought against the ship itself. The plaintiff's counsel insisted that the contract was for such a special use of the ship as that, upon any breach, from that moment, a lien upon the ship was by law created for the damages sustained of the same nature, and enforceable in the same way as a maritime lien.

Held, that the lien claimed does not exist by the law of England: *The Pical Superiore*, 5 P.C.; *The Heinrich Bjorn*, 10 P.D.; *The Ella*, 13 P.D.; *The Queen* v. *Judge of City of London Court* (1892), 1 Q.B.; *The Geta* (1893) A.C., and *The Theta* (1894), P.D., and that the jurisdiction in Admiralty is exercised here upon the principles of the English law. Action dismissed with costs.

Russell, for plaintiff. *Bradburn*, for defendant.

Book Reviews.

Tudor's Leading Cases on Real Property and Conveyancing, 4th ed., 1898. London: Butterworths. Canadian agents: Canada Law Journal Company, Toronto.

Mr. Tudor's well known volume bearing the above title, contains a selection of leading English cases on the law of real property and conveyancing, and the construction of wills and deeds reported in full, and followed by copious and comprehensive annotations, which are in themselves equivalent to a text-book upon the law of real property. The new edition is a very satisfactory one, and an examination of the annotations proves them to be both accurate and complete, and to have been brought down to the present year. The book will be found exceedingly valuable to those interested in real property law.

American and English Encyclopædia of Law, 2nd edition, 1898. Edward Thompson Company, Northport, N.Y.

To those who have used the first edition of this valuable work—and who has not—one need only say that the second edition, seven volumes of which have been issued, is upon the same plan as the first. The plan of the work it would indeed be hard to improve upon. The varieties of type, and the numerous cross references and sub-divisions make it a matter of comparative ease to find any subject ordinarily sought for within the range of law books. The citation of Canadian and English authorities, in addition to those of the American courts, is made a special feature of the work. The edition is expected to be completed in 32 volumes, inclusive of index.

Analysis of Snell's Principles of Equity, by E. E. BLYTH, LL.D., Q.C., 6th edition; London: Stevens & Haynes, 1898.

This little work is, as it purports to be, very useful to law students, especially in preparing for examinations, and is intended to be used as a companion to Snell's Equity. There is no doubt of the value of the analysis used, however, for purposes of examination, and we fear at the expense of the original work.

Flotsam and Jetsam.

"It has been said that the object for which punishment is inflicted is not only to correct the wrong-doer himself, but to deter others from following his example. I sometimes doubt whether punishment deters. I had a little case at Chandler not long ago in which I had cause to doubt it. I defended a fellow for shooting quail. I succeeded admirably in the case. I got my client fined, and it cost him about eighty dollars. Two weeks afterward I saw the defendant in the field with a double-barrelled shotgun, two or three dogs, and as many coffee sacks. I called to him and asked: 'What are you doing there?' He answered: 'Killing quail to pay that fine with.'"—*Albany Law Journal.*

The case of the girl Kate Shoesmith, recently condemned to death for the murder of her illegitimate baby, has called public attention once again to the haphazard, Draconian character of our punishments for homicide. Between a half-demented girl and a cold-blooded poisoner the law knows no difference. An unwilling jury convict, and an unwilling judge sentences, imploring God to have mercy on an unhappy soul more sinned against than sinning, the mercy of man being postponed till "recommendations are forwarded to the proper quarter." Then, after a week of mental agony for the prisoner, the Home Secretary intimates that Her Majesty is graciously pleased only to inflict a punishment on the poor wretch some twenty times more severe than the usual punishment of a garrotter. Occasionally the law stretches its benignity to the uttermost. After five or ten years a Home Secretary may, if not otherwise occupied, give his attention again to the case, and the woman emerges, a battered gaol-bird of five and thirty, good for nothing more in this world. Yet the man escapes scot-free. Bentham, with whom punishment was a science as well as a sentiment, wrote of the subject long ago :—"The laws against this offence, under pretence of humanity, are a most manifest violation of it. Compare the offence with the punishment. The offence is what is improperly called the death of an infant, who has ceased to be, before knowing what existence is—a result of a nature not to give the slightest inquietude to the most timid imagination, and which can cause no regrets but to the very person who, through a sentiment of shame and pity, has refused to prolong a life under the auspices of misery. And what is the punishment?—the barbarous infliction of an ignominious death upon an unhappy mother whose very offence proves her excessive sensibility ; upon a woman guided by despair, who, in hardening her heart against the softest instinct of nature, has harmed no one but herself. She is devoted to infamy because she has dreaded shame too much, and the souls of her surviving friends are poisoned with grief and disgrace.—*London Law Times.*

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1898.

(*Continued from p.* 676.)

Mr. Osler, from the Reporting Committee, presented the following report in respect to the delays in issuing the reports, and on the reporting of cases on (winding-up) companies : Your Committee have enquired as to the delay in the issue of the reports by the publishers, and report as follows : That some delay arises from the difficulty in obtaining revisions of the draft reports as first printed from the judges, and that for this delay there seems to be no remedy. That there is a delay of from eight to fourteen days after the advance copies are delivered at Osgoode Hall before the edition is distributed to the profession, and that this is the necessary and ordinary time required for the publishers' staff to bind and deliver the numbers. Orders have been given that advance copies are to be sent to each county library, and this will to some extent put the country members on a par with those in the city. As to the reporting and winding-up cases before the Master-in-Ordinary, it will be found that many such cases have been reported, and Mr. Brown has been instructed to report all cases under the Winding-up Act that are of sufficient importance, whether such cases go to appeal or not.

It was ordered that the Reporting Committee be requested to consider what course, if any, can be taken to secure from the Supreme Court of Canada a proper system whereby causes before that Court should not be taken up, either by surprise to counsel, or without a fair opportunity to be in attendance, in view of the long distances which counsel travel in order to attend the Supreme Court. Convocation then rose.

TUESDAY, June the 28th, 1898.

Present, the Treasurer, the Attorney-General, Hon. A. S. Hardy, Messrs. Aylesworth, Barwick, Bayly, Bell, Britton, Clarke, Douglas, Edwards, Guthrie, Hoskin, Martin, Riddell, Ritchie, Shepley, Strathy, Watson and Wilkes.

Dr. Hoskin, from the Discipline Committee, presented the following report :

The Discipline Committee to whom the complaint of His Honour Judge Dartnell against Mr. Samuel Simpson Sharpe, of the city of Toronto, student-at-law, was sent for investigation, beg to report that your Committee appointed a day for the purpose of proceeding with the complaint in question. Before the day appointed for such investigation arrived, the said Mr. Sharpe in writing apologized for the act complained of by His Honour Judge Dartnell, whereupon the said Judge wrote to the Chairman accepting the said apology and withdrawing his complaint, whereupon the Chairman of your Committee notified the members not to attend on the said investigation, as the matter would not be proceeded with. Your Committee are of opinion that no action should be taken in the matter. The report was received and having been taken into consideration was adopted.

Dr. Hoskin, from the Discipline Committee, then presented the following report :—

The Discipline Committee to whom the report of the Finance Committee in the matter of one J. B. Dixon, had been sent for investigation, beg to report : —

1. That from the said report of the Finance Committee, it appeared that one J. B. Dixon had advertised himself in a Brampton paper as a solicitor.

2. That your Committee appointed a day to proceed with the said investigation and was attended by the solicitor for the Law Society and the said J. B. Dixon and his counsel, and the evidence submitted was taken by your Committee.

3 From said evidence it appeared that the said advertisement was inserted without the knowledge or concurrence of the said Dixon, and was withdrawn the moment it was brought to his notice.

4. It appears that the said J. B. Dixon is an articled clerk who has not presented himself for examination, and it did not appear from the evidence submitted to your Committee that the said J. B. Dixon had been acting as a solicitor directly or indirectly.

5. Your Committee is of opinion that no further action should be taken in the matter. The report was received, and having been taken into consideration was adopted.

Mr. Shepley, from the Legal Education Committee, reported upon the results of the First Year Examination of the Law School in Easter, 1898.

Ordered that the following gentlemen be allowed their first year examination :—W. N. Munro, A. E. McNab, W. A. Mackinnon, M. G. V. Gould, E. G. Long, T. Gibson, G. E. Buchanan, J. E. Wallbridge, G. E. Taylor, J. A. Peel, A. M. Fulton, W. A. Nisbett, C. W. Moore, P. W. O'Flynn, F. H. A. Davis and C. W. Goodwin (equal), H. A. Tibbetts, J. H. Parker, W. D. B. Turville, W. M. Kellock, J. L. Counsell, G. Bray, M B. Tudhope, J. F. L. Embury and H. L. Jordan (equal), E. W. Clement, R. H. M. Temple, E. S. Senkler, C. McCrea, A. N. P. Morgan, O. D. Garbutt, J. L. O'Flynn, F. J. S. Martin and P. McDonald (equal), G. E. Kingsford, R. R. Bradley, C. K. Graham, W. B. Scott, T. D. McGee, T. I. McNeece, R. C. H. Cassels, W. B. S. Craig, H. G. Myers,

J. A. Primeau, L. G. D. Legault, H. V. Hamilton, G. J. McArthur, C. S. Tapscott, S. A. Armstrong.

Ordered that the following gentlemen be allowed their first year examination with honours: Messrs. W. N. Munro, A. E. McNab, W. A. Mackinnon, M. G. V. Gould, E. G. Long, T. Gibson, G. E. Buchanan, J. E. Wallbridge, G. E. Taylor, J. A. Peel and A. M. Fulton.

The report further proceeded upon the results of the second year examination held at Christmas, 1897, and Easter, 1898. Ordered that the following gentlemen be allowed their second year examination: W. T. White, J. A. Rowland, D. Donaghy, H. R. Smith, A. R. Clute, J. G. O'Donoghue, J. Jennings, M. W. McEwan, R. I. Towers, R. C. McNab, R. F. McWilliams, F. B. Proctor, C. F. Maxwell, G. H. Gauthier, J. C. Brown, J. W. Mahon, M. R. Gooderham, G. A. Ferguson, J. G. Merrick, O. S. Black, A. Spotton, W. C. Brown, J. W. Lawrason, E. C. Sanders and V. P. McNamara (æq.), N. H. Peterson, H. C. Osborne, T. F. Slattery, W. Wadsworth, J. H. Craig and J. P. Stanton (æq.), A. C. Kingston, C. F. W. Atkinson, W. T. Goodison, A. W. Holmsted, J. R. Osborne, J. D. Falconbridge, G. B. Henwood, G. F. Mahon, W. E. N. Sinclair, H. Boldrick, T. A. White, J. G. Stanbury, W. C. Armstrong, C. Garrow, F. K. Johnston, A. F. Healy, C. W. Bell, J. W. Crozier, T. H. Crerar, J. C. Milligan, J. S. Lundy, T. E. McKee, O. de Laplante.

On the same report it was ordered that Mr. J. C. L. White, who was in Hilary Term last given permission to write at this examination on the subject of Practice, and has now on the result of his examination upon all subjects of the Second Year obtained sufficient marks to entitle him to be allowed same, be allowed same accordingly.

It was further ordered that the case of Mr. Bowerman, who has passed the examination be referred back to the Committee on Legal Education for consideration and report; and it was ordered that Messrs. J. A. Milne and J. H. Campbell, who upon a supplemental return of the examiners appear to have obtained the necessary number of marks to entitle them to be allowed their second year examination, be allowed same accordingly. And also ordered that the following gentlemen be allowed their Second Year Examination with honours: W. T. White, J. A. Rowland, D. Donaghy, H. R. Smith, A. R. Clute, J. G. O'Donoghue, J. Jennings, M. McEwen, R. I. Towers, R. C. McNab, R. F. McWilliams, F. B. Proctor, C. F. Maxwell, G. H. Gauthier, J. C. Brown.

Mr. Shepley presented a further report from the Legal Education Committee, and it was ordered that the following gentlemen be admitted as students-at-law of the Graduate Class as of Easter Term, 1898:—Messrs. A. W. Anderson, T. F. Battle, E. W. Beaty, O. M. Biggar, S. E. Bolton, Ogle Carss, Gordon M. Clark, R. H. Greer, H. P. Hill, A. W. Hunter, J. A. Jackson, C. G. Jones, A. Macgregor, D. B. White, and Mr. E. S. Fraser of the Matriculant Class; and in the case of Mr. F. L. Davidson, ordered that he be admitted as a student-at-law of the Graduate Class, and that he be permitted to write for the first year examination at the Supplemental Examination in September next, and upon passing same to proceed with the second year of the Law School course, during the next school session, and to write for the second year examination at the end of the School Session in May, 1899. And in the case of Mr. L. M. Lyon, ordered that he be permitted to write at the Supplemental Examination of the third year in September next in the subjects prescribed for the examination at Christmas last.

Mr. Shepley, on behalf of the Legal Education Committee, reported in continuation of their Report of 3rd of June last, in respect to the Third Year Examination, and it was thereupon ordered that the following gentlemen be called to the Bar and receive their certificates of fitness: H. A. Burbidge, S. H. B. Robinson, A. C. W. Hardy, A. R. Hamilton, F. L. Pearson, T. H. Hilliar, J. B. T. Caron. And that Mr. D. M. Stewart, who upon a supple-

mental return by the examiners appears to have obtained the necessary number of marks to entitle him to be allowed his Third Year Examination, be allowed same.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report on applications for relief, recommending as follows: That Mr. C. E. Hollinrake do re-article himself and serve under articles until the first day of Trinity Term next, that his notice do remain posted meantime, and upon the completion of his papers during Trinity Term he be, if no objection is made to appear, called to the Bar and do receive his certificate of fitness. That Mr. G. G. Moncrieff's service under articles since the 28th September, 1897, be allowed him. That Mr. F. E. Perrin, under the circumstances, upon filing the duplicate articles entered into by him and his papers being in all respects correct and regular, be called to the Bar and receive his certificate of fitness. That Mr. E. G. Osler's admission on the books of the Society be reckoned as of Easter Term, 1885, and that his papers being in all other respects correct and regular, he be called to the Bar to receive his certificate of fitness.

Convocation adopted the recommendations and ordered accordingly.

The Secretary reported that he had on the nineteenth day of June instant, pursuant to the order of Convocation of the third of June instant, issued notices to all Benchers of the Law Society of a meeting of Benchers on this day (Tuesday, 28th June), specially called for the purpose of supplying the vacancies caused by the failure of Messrs Colin Macdougall, Q.C., and Donald Ban Maclennan, Q.C., to attend the meetings of the Benchers for three consecutive terms, and in succession to the late D'Alton McCarthy, Q.C. Messrs. Colin Macdougall, Donald Ban Maclennan and Zebulon Aiton Lash were then elected Benchers, to hold office until the beginning of Easter Term, 1901.

Mr. Shepley, from the Legal Education Committee, reported in respect of the case of Mr. John Charles Elliott: The Committee has carefully considered the case; Mr. Elliott appeared before the Committee, and was heard on his own behalf. The Committee recommend that his application for Call to the Bar and for certificate of fitness be not granted. Ordered accordingly.

Mr. Shepley presented the following report from the Legal Education Committee, with respect to the Law School course: The Committee has considered the subject of providing for a full course of three years in the Law School compulsory on all students, and also so much of the Principal's report as relates to the Law School course, and begs to submit the following conclusions: 1. The three years' attendance should be continuous and unbroken. 2. Graduates should attend during their first, second and third years. 3. Matriculants should attend during their third, fourth and fifth years. 4. That the examinations held at Christmas should be made independent and complete in themselves so far as pass students are concerned, while with respect to Honour men the present system of combining the results of the Christmas and Easter examinations should be continued. 5. The above of course involves the abolition of the half year option referred to in the Principal's report. 6. The differentiation of Honour from Pass men in the second and third years suggested in a former report of the Principal to be by means of an examination in additional subjects to be prescribed by the Committee from time to time. 7. The rules necessary for carrying the first three paragraphs of this report into effect, should it be adopted by Convocation, should not become operative before the school session of 1899-1900.

The report was received and ordered to be taken into consideration clause by clause.

Mr. Shepley moved the adoption of the first, second and third clauses of the report.

Mr. Strathy moved in amendment that matriculants be required to take the first, fourth and fifth years in the Law School. Lost on a division.

The various clauses were adopted separately and the report then adopted as a whole.

Mr. Shepley presented the following report from the Legal Education Committee with respect to changes in the Law School building: The Committee has had under consideration that part of the Principal's sessional report which relates to the question of improved library and reading-room accommodation in the Law School. The Committee has had before it a report from the Librarian, showing that the average daily attendance of students in the reading room during the past session has been a fraction over 43, while the attendance has risen to the large figure of 81. The Committee has examined the premises, and reports that the provision now made is entirely inadequate. In the opinion of your Committee, the time has now arrived when the Law School building should be completed, and that some alterations may be found desirable in the completed portion of the building. The Committee thinks that the work should be undertaken with four objects in view: 1. The maintenance of sufficient lecture room accommodation. 2. The securing an adequate library and reading room accommodation. 3. The securing of a suitable common room for the use of the students. 4. The improvement (if at all feasible) of the present arrangements for heating and ventilation. The Committee reports accordingly, and recommends that this, or a special committee, should be entrusted with the carrying out of the work should it appear that it can be done between this date and the opening of the school in the fall, or if not, with the procuring of plans and estimates for submission to Convocation. Ordered that the Legal Education Committee do obtain and report to Convocation plans and estimates.

Mr. Shepley, on behalf of the Legal Education Committee, further reported: The Committee reports upon the reference by Convocation to this Committee on December 3rd, 1897, to consider whether any, and if so, what amendment should be made to Rule 150, that in the opinion of the Committee, no amendment to that rule is either necessary or desirable. On the contrary, your Committee is of opinion that effect should be given to the rule in all cases. The report was adopted.

Mr. Shepley, from the Legal Education Committee, presented their report on applications for relief, and recommended as follows: In the case of Mr S. A. Hutchison, that the certificate of service from Mr. G. Hutchison, now deceased, be dispensed with, and that the remainder of the petition do stand until Trinity Term In the cases of Messrs. W. Cain and E. M. Meighen, whose notices have remained posted pursuant to the order of 3rd June, 1898, that they be admitted as students-at-law of the Matriculant Class as of Easter term. In the case of Mr. Alfred Hail, that he be called to the Bar and receive his certificate of fitness. Convocation adopted the recommendations and ordered accordingly. The following gentlemen were then called to the Bar: Messrs. A. G. Slaght, E. J. Daly, H. A. Burbidge, D. R. Dobie, E. G. Osler, S. H. B. Robinson, A. C. W. Hardy, C. A. Macdougall, J. C. Hamilton, T. H. Hilliar, J. B. Noble, W. L. McLaws, A. Hall, A. R. Hamilton, E. T. Bucke, D. P. Kennedy, J. B. T. Caron, F. L. Pearson, I. R. Carling.

Convention adjourned until 2 p.m., when the complaint dated 13th June, 1898, of Mr. D. Ferguson, complaining of the conduct of Mr. A. E. Fripp, was read; ordered that the Secretary do inform Mr. Ferguson that his letter does not give sufficient particulars on which an opinion can be expressed by Convocation

The letter of Mr. Geo. Leighton, complaining of the conduct of certain practitioners in the county of Dufferin was read. Ordered that no action be taken thereon. The letter of Mr. W. S. Wilson of June 25th, 1898, to the Treasurer, drawing attention to the letter signed by D. Urquhardt, Gideon Grant, and Charles Elliott of June 10th, 1898, to collect funds to defend the suits brought against members of the "Select Knights" for calls, was read. Ordered that the communication be referred to the Discipline Committee to enquire whether there

be a prima facie case against the parties signing the letter. The complaint of Mr. E. W. Nelles against Mr. F. J. Travers, accompanied by a statutory declaration, was read. The statutory declarations of Mr. Travers and others volunteered in reply were read, and it was ordered that the complaint be referred to the Discipline Committee for investigation.

The report of the Committee on Journals and Printing upon the propriety of establishing a system for giving notice to members of the business to be laid before Convocation, which had been presented May 17th, 1898, and had been on that day ordered for consideration to-day, was read, and Mr. Watson moved the adoption of the report.

Mr. Edward moved in amendment that the report be referred back for further consideration. Lost. The report was then adopted.

Mr. Shepley moved for leave to introduce a rule providing that the Legal Education Committee shall consist of fourteen members. Granted. Mr. Shepley moved the first reading of the Rule as follows: That Rule 29 be amended by striking out the word "Committee" in the second line thereof, and inserting instead thereof the words "and Legal Education Committees respectively." The rule was read a first and second time, and Mr. Shepley moved the suspension of Rule 24 (as to stages). Granted. The rule was read a third time and passed.

Mr. Shepley moved for leave to introduce a rule to be numbered No. 31a. Granted. Mr. Shepley moved the first reading of the Rule as follows: "31a. If at any meeting of any Committee, either standing or special, a quorum of the members of such Committee should not be in attendance at the hour appointed, any member or members of Convocation not on the Committee may at the request of the chairman or convener of the Committee, or in his absence, of any two members of the Committee, sit in such Committee during such meeting, and a quorum so composed shall have all the powers, at such meeting, of a quorum wholly composed of members of such Committee." The rule was read a first and second time, and Mr. Shepley moved the suspension of Rule 24 (as to stages). Granted. The rule was read a third time and passed.

Ordered that Messrs. Lash and Barwick be elected as members of the Legal Education Committee, Messrs. Lash and Macdougall members of the Reporting Committee, Messrs. Lash and Maclennan members of the Discipline Committee, and Messrs. Macdougall and Maclennan, members of the Journals Committee.

The list of members of the standing committees for 1898-99 is as follows:

FINANCE.

G. H. Watson, Chairman; A. B. Aylesworth, B. M. Britton, A. Bruce, A. H. Clarke, E. B. Edwards, G. C. Gibbons, John Hoskin, W. Kerr, E. Martin, W. R. Riddell, C. H. Ritchie, G. F. Shepley, H. H. Strathy.

REPORTING.

B. B. Osler, Chairman; Walter Barwick, B. M. Britton, E. B. Edwards, D. Guthrie, W. D. Hogg, J. Idington, Z. A. Lash, Colin Macdougall, W. Proudfoot, C. H. Ritchie, J. V. Teetzel.

DISCIPLINE.

John Hoskin, Chairman; Walter Barwick, R. Bayly, A. Bruce, E. B. Edwards, D. Guthrie, W. D. Hogg, Z. A. Lash, D. B. Maclennan, C. Robinson, H. H. Strathy, G. H. Watson.

LEGAL EDUCATION.

G. F. Shepley, Chairman; Walter Barwick, R. Bayly, John Hoskin,

Z. A. Lash, E. Martin, B. B. Osler, W. Proudfoot, W. R. Riddell, C. H. Ritchie, C. Robinson, H. H. Strathy, J. V. Teetzel, G. H. Watson.

LIBRARY.

A. B. Aylesworth, Chairman; S. H. Blake, A. H. Clarke, W. Douglas, J. Idington, W. Proudfoot, W. R. Riddell, C. H. Ritchie, C. Robinson, G. F. Shepley, H. H. Strathy, G. H. Watson.

JOURNALS AND PRINTING.

A. Bruce, Chairman; A. B. Aylesworth, Walter Barwick, R. Bayly, John Bell, A. H. Clarke, G. C. Gibbons, W. Kerr, Colin Macdougall, D. B. Maclennan, M. O'Gara, J. V. Teetzel.

COUNTY LIBRARIES.

E. Martin, Chairman; B. M. Britton, A. Bruce, W. Douglas, G. C. Gibbons, D. Guthrie, J. Idington, W. Kerr, M. O'Gara, B. B. Osler, H. H. Strathy, A. J. Wilkes.

(By Rule 29 the Treasurer is ex officio a member of all standing committees.)

The petition of Charles Cyrus Grant, of St. Thomas, praying for admission as a student-at-law, accompanied by his letter of June 23rd, and the letter in his favour by Mr. R. Miller, of St. Thomas, were laid before Convocation and read. It was moved that Mr. C. C. Grant be admitted as a student-at-law. Lost.

Mr. Edwards, from the Reporting Committee, presented the letter of Mr. J. F. Smith, Q.C., compiler of the Consolidated Digest, reporting that sufficient progress with the work had been made to justify payment of the sum of $625. The letter was referred to the Reporting Committee for their report upon the said letter, in order that a certificate in accordance with the terms of the contract be furnished by the Committee.

Ordered that the following gentlemen be paid the scholarships found due them by the reports of the legal education committee:

First year: Mr. Munro, $100; Mr. NcNab, $60, and Messrs. McKinnon, Gould, Long, Gibson and Buchanan, each, $40.

Second year: Mr. White, $100; Mr. Rowland, $60, and Messrs. Donaghy, Smith, Clute, O'Donoghue and Jennings, each, $40.

Mr. Martin, from the County Libraries Committee, reported: That the Essex Law Association has applied for a loan to purchase books necessary for the efficiency of their library. Your Committee recommend that a loan of $360 be made to the Association, repayable in twelve yearly instalments of $30 each, the first payment to be made Dec. 31st, 1900, and yearly thereafter until the loan is paid off, security to be given for the due expenditure of the loan in the purchase of books. Ordered that the said sum of $360 be paid upon security being given for the due expenditure of the money, to the satisfaction of the Committee.

Canada Law Journal.

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We have received from Mr. Lefroy an answer to Mr. Labatt's criticism on his article in the *Law Quarterly Review* in reference to some matters of constitutional law which arose in the Canadian Fisheries appeal case. Want of space compels us to hold it over until our next issue.

Practitioners will be glad to see the announcement of a new book of legal forms, by Mr. Edwin Bell, of Chatham, and Mr. H. L. Dunn, of Toronto. It is further noticed in our review columns. It was much needed. It is the first in the field under the new Rules and the work is apparently done excellently well.

CONCERNING COURTESY IN JUDGES.

"Four things," said the greatest of all the Greeks, "belong to a judge; to hear courteously, to answer wisely, to consider soberly, and to decide impartially." We make the first of this quartette of judicial qualities the text of our present observations, and do not refer to incompetence, partiality or failure of duty, which should be dealt with after a different fashion.

The judicial Bench is perhaps of all stations in life the one that calls for suaviter in modo with a carefully balanced fortiter in re. It demands, and, of necessity, should have untrammeled freedom of action, and absolute immunity from all control, political or otherwise, and it is the very counterfeit presentment of sovereignty itself—which can do no wrong in thought, word or deed. Judges are channels of the pure fountain of justice which must receive no pollution whatever, as it flows through them from its royal source to water the seed grain of national peace and prosperity.

It will not be said that this journal has been unmindful of its duties in upholding the dignity and good name of the Bench. We have therefore no hesitation in referring to the subject, especially as it is interwoven with the high standard of the Bar and the welfare of the community at large. We are not unmindful of the evil resulting from criticism of the judiciary by the lay press, fanning, as it does, the flame of revolt against authority, forever smouldering in the dregs of society; but we are not writing to the public, but to and for those who are deeply interested in the subject, and are themselves actors in the scene.

Sacred as are the rights of the Bench, equally so are those of the Bar, who are the helpmeets of the Bench, and the ranks of the former are the recruiting ground of the latter. To the judges, the profession, and especially its younger members, look for, or should look for, inspiration and a worthy example, and so it comes that as is the Bench, so will be the Bar. A decadence in the tone of the one works a corresponding decadence in that of the other.

It may as well be said plainly that there is a feeling of dissatisfaction on the part of the Bar, and especially of its younger members in certain parts of the Dominion, at their discourteous treatment by some judges. Indignant and angry comment is also heard in reference to the ungoverned temper which so frequently disturbs the harmony of our highest Court. If we are told that its chief is a man of great ability, it may be answered that we can better dispense with a judge of extraordinary attainments than with that which conserves the respect due to the sovereign power which he represents.

In some instances discourtesy to the Bar is of a nature which can only be characterized as cowardly. It is not the leaders of the Bar who are on these occasions treated to a sneer, or a snub, or a rude rebuff, but rather those whose youth and inexperience would give to the large hearted, generous judge, strong in the knowledge of his power, the happy opportunity of encouraging the timid, teaching the inexperienced, or, if necessary, courteously rebuking a breach

of professional decorum, or an offensive pertinacity, or, it may be, severely censuring a piece of sharp practice, or other conduct unworthy of our noble profession. The evils complained of are growing ones, and there must be an end to them. The traditions of the Canadian Bench are a sacred trust, and he who violates them is doing his country a wrong which he can never remedy.

It is not at present necessary further to particularize. We trust it may never be necessary so to do. We are not writing as we have said, to the public, but to those who know whereof we speak. Names need not now be given, for the members of the Bar have a keen sense in such matters, and those of the Bench (happily only a few) who offend in these respects, also know to whom these remarks apply. It is necessary in this matter to hew to the line, and let the right men fill their baskets with the chips.

We are very proud of the Bench of this Canada of ours. No country outside of England can compare with it as a whole, and it is because we are jealous of its reputation, as well as impelled by a sense of duty to the profession, that we now call attention to the complaints referred to.

Indelibly impressed upon the memory of the writer is a scene in the library of Sir John Beverley Robinson, when Chief Justice of old Upper Canada. It was in the days of technical pleading and practice, and petty motions by way of summons and order. The room was crowded with barristers and law students, waiting their turn for a hearing. The Chief sat in one chair, with his feet on another, one foot swathed in flannels, with marks of agonizing pain occasionally passing across his face. One by one the motions were made and patiently heard. Never once did the pain he suffered, or the ignorance, or pertinacious stupidity of some novice, ruffle the serene courtesy of his speech or manner. Leaders, juniors and students were treated alike and, if there was an exception, it was in favor of the last, when this learned and venerated judge, with an encouraging smile, explained to some raw student what the practice was, or wherein his material was defective. As it was in the

days of such men as a Robinson, a Macaulay, a McLean or a Draper, in Upper Canada, so it was in Nova Scotia and the other provinces by the sea.

In those days we heard no such tales as come to us from time to time in these days. The judges knew their place, and wherein the strength of their position lay, and the Bar respected and admired, and in the main, sought to imitate them, and both clients and the country were the gainers.

Every true man is, or should be, jealous of the honor of the order to which he belongs, and we feel confident that this word to the wise coming, not from an individual, but as the general voice of the Canadian Bar, will not be contemptuously passed by. We are not fearful, therefore, of giving offence in this matter, nor, should anyone be offended, are we careful to consider who that person may be.

ATTACHMENT OF RENT.

To what extent rent is attachable does not appear to be very satisfactorily settled. Rent actually payable can clearly be attached, as was decided by the English Queen's Bench in 1867, in *Mitchell* v. *Lee*, L.R. 2 Q.B. 259. It has been said by some judges that rent accruing due may now also be attached, as under the Apportionment Act, R.S.O., c. 170, s. 4, it becomes due *de die in diem*, and that on the following gale day the portion accrued up to the service of the attaching order may be properly ordered to be paid to the attaching creditor: *Massie* v *Toronto Printing Co.*, 12 P.R. 12; but in that case the Master-in-Chambers says that an attaching order could only affect rent which had accrued up to the date of it, and could not affect future accruing rent, because it might not become payable by reason of the eviction of the tenant. And this view was confirmed by Galt, J., and subsequently approved by Boyd, C., in *Patterson* v. *King*, 27 Ont. 56: but the reasoning which the Master-in-Chambers assigned for the non-attachability of future accruing rent would appear to apply just as forcibly to every day's rent before the day it actually becomes payable. In *Clapham* v. *Draper*, 1 Cab. & E.

484, a tenant was evicted by a superior landlord during a quarter. His lessor claimed to recover a proportionate part of the quarter for the period he had had possession, but it was held that the eviction was a bar to his recovering any part of the quarter's rent.

Even in the Division Courts, where legal questions are not too rigidly considered, a difference exists on this point, in part due to the difference between the wording of the Division Court Act and the Consolidated Rules; the former only authorizing the attachment of debts due and owing, while the Consolidated Rules enable debts "due and accruing due" to be attached. Dean, Co. J., in the case of in *Birmingham* v. *Malone*, 32 C.L.J. 717, thought this difference in wording ought to make no difference in the construction of the Act and Rules, but Ketchum, Co. J., in *Christie* v. *Casey*, 31 C.L.J. 35, thought it a vital point of difference. In the latter case it was decided that rent between gale days could not be attached, and in *Birmingham* v. *Malone*, it was held that it could. A recent case of *Barnett* v. *Eastman*, 61 L.J. Q.B. 517, seems to support the view of Ketchum, Co. J., even though the Division Court Act is construed as being to the same effect as the Rules, for there Day, J., held that under the English Supreme Court Rules, which are the same in effect as the Ontario Consolidated Rules, rent cannot be attached before the day of payment. So far as the Courts of Ontario are concerned the foundation of attaching rent before the day of payment is *Massie* v. *Toronto Printing Co.*, supro, a decision of the late Mr. Dalton (certainly a lawyer of no mean rank), affirmed by Galt, J., and acquiesced in by Boyd, C., in *Patterson* v. *King*. But as we have already pointed out, the very case on which the practice is founded seems also to contain a refutation of its soundness, rather shows that rent not yet payable is within the decision of the Court of Appeal in *Webb* v. *Stenton*, 11 Q.B.D. 518. The point is deserving of the attention of a Divisional Court as soon as possible.

INTOXICATING LIQUORS.

The question as to what is an intoxicating liquor within the prohibition of the Ontario Liquor License Act—the Act itself furnishing no assistance in the matter by definition or otherwise—has lately come up for decision in magistrates' courts in the city of Toronto and the county of York. The police magistrate of Toronto held that a beer containing 2.11 per cent. of alcohol was not an intoxicating liquor, and a few days later two county magistrates decided that samples of the same beer showing on analysis 2.43 and 2.66 per cent. of alcohol, respectively, were intoxicating liquors. In deciding as they did the county magistrates followed a considered but unreported judgment of His Honor Judge McDougall, given in November, 1885. This decision was that a beer containing from two to three per cent. of alcohol was an intoxicating liquor within the meaning of the Act.

For some months past light beers showing on analysis two to three per cent. of alcohol, have, under various names, been freely sold throughout the province by unlicensed persons. These drinks are advertised to resemble, as they do in fact, both in taste and appearance, the ordinary lager beer, and it is said that every dive keeper in Toronto has his regal beer or jubilee pumps, and that in the parks and at the fall fairs these beverages have been popular drinks. In seeking to bring them within the License Act the provincial authorities say, not only that the drinks are mild intoxicants, but that being sold as temperance drinks they are taken as such by young persons and others unaccustomed to the use of intoxicants, and thus an appetite for stimulants is unconsciously aroused, and moreover that resembling so closely ordinary lager beer, it is impossible, without an analysis in every case, for the officers of the law to tell whether the booth and dive keepers are selling the diluted forms or the ordinary lager. Lager beer, it may be stated, contains from three to five per cent. of alcohol, and is admittedly an intoxicant.

The decision of Judge McDougall having been reached after a most exhaustive inquiry, extending over several days,

during which nearly fifty witnesses, most of them physicians, were examined, and being one that applies to all liquors of the class above referred to, it is unfortunate that it should have been allowed to drop out of sight. But it is never too late, even for law journals, to mend, and a sound declaration of the law, even though it were as old as the twelve tables, is always in order. A report of this judgment will be found in extenso in another place.

Though no mention is made of the fact by Judge McDougall in his judgment, it is noted in the Canadian Pharmaceutical Journal of December, 1885, as an incident of the trial—which, of course, had a medical as well as a legal interest—that towards its close one of the witnesses procuring some of the beer reserved by the inspector, made an experiment in the presence of medical gentlemen on two persons not accustomed to the use of intoxicants who consented to become subjects, with the result that both became undoubtedly "tight," after taking six or seven glasses each. The evidence of this novel experiment was put in in rebuttal.

In connection with this subject it is worth noting that the British Revenue Act of 1885 defines the word beer as follows: "The term beer in the Inland Revenue Act of 1880 shall be construed to extend to any liquor which is made or sold as a description of beer, and which on analysis of a sample thereof at any time shall be found to contain more than two per centum of proof spirit." Two per cent. of proof spirit equals about 1.14 per cent. of absolute alcohol; so that in Great Britain any beer containing more than that percentage of alcohol is for legal purposes classed with ales and porters containing six, eight, or ten per cent. of alcohol, and can only be made or sold by persons holding licenses under the Inland Revenue Act. Whether our courts, following the analogy of the British Statute, would hold that a beer containing more than the last named percentage of alcohol comes within the prohibition of the Liquor License Act, remains to be seen. At present the declaration of the law in Ontario goes no further than Judge McDougall's decision.

W. E. RANEY.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act).

JUDICIAL SEPARATION — CRUELTY COMMITTED OUT OF JURISDICTION—JURISDICTION OF COURT.

Armytage v. *Armytage* (1898) P. 178, was a matrimonial action, in which a wife claimed a judicial separation on the ground of cruelty. Both parties were living within the jurisdiction when the action was commenced, but the defendant's domicil was in Australia, and the cruelty had been committed abroad, and the plaintiff alleged that she feared a repetition of it if she resumed cohabitation with the defendant. The question was raised whether the Court had jurisdiction to entertain the action under these circumstances. Barnes, J. held that it had.

COMPANY—DEBENTURES—CHARGE ON ALL PRESENT OR FUTURE "PROPERTY" OF COMPANY—UNCALLED CAPITAL—WINDING UP.

In re Russian Spratts (1898) 2 Ch. 149. The point involved was a very simple one. A company by its debentures had expressly charged all its "present or future property," and the question was, whether capital uncalled at the time of a winding-up order being made was future property of the company within the meaning of the debentures, and charged thereby. The Court of Appeal (Lindley, Rigby and Collins, L.JJ.), agreed with Stirling, J., in answering that question in the negative.

COMPANY—SECRET PROFIT—PROMOTERS.

Re Olympia (1898) 2 Ch. 153, is a decision of the Court of Appeal (Lindley, Rigby and Collins, L.JJ.), overruling Wright, J., on a point of company law. The object of the proceedings was to compel certain promoters of a company to make good to the company, for the benefit of its creditors, a secret profit which the promoters had made under the following circumstances. A syndicate was formed for the purpose of buying up the property of a company in liquidation,

and for the purpose of promoting a new company to take over the property so to be purchased. The property in question was subject to debentures for £100,000 and a mortgage for £10. The syndicate agreement provided that if a new company was formed, four members of the syndicate named therein should be directors of the company, and these four were also appointed trustees, to do what was necessary to carry out the objects of the syndicate, with power to purchase, as an interim investment of the syndicate's funds, any debentures of the old company. It was also provided that any sale to a new company was to be subject to certain agreements for giving the contract for advertising and furnishing refreshments to firms in which members of the syndicate were interested. The syndicate purchased the mortgage and some of the debentures much below the amount they ultimately realized, and made a profit of £20,000, of which the share of the four trustees was £6,341. They subsequently bought the property of the defunct company for £140,000, and resold it to one Close as trustee of the new company for £180,000, and it was declared that the purchase was not to be in any way avoided by any secret profit made by the promoters or any of them, nor should the vendors be required to account for any such profit. The new company was thereafter formed, and the four trustees became directors thereof, and ratified and affirmed the agreement made by Close with the syndicate, and it was agreed that any profits made by the syndicate from interim investments were not included in the sale to the new company. The new company thus formed, having been ordered to be wound up, the liquidator claimed that the four directors should make good to the company the £6,341, which they had made as above-mentioned. Wright, J., was of opinion that they were in no fiduciary relation to the company at the time the purchases of the mortgage and debentures were made, and were therefore not liable to account. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.), however, were of a different opinion; they considered that the syndicate trustees owed a duty to the new company when formed, not to make any profit out of it

without informing it of the fact, and giving it the opportunity of declining to allow such a profit to be made at its expense. That the disclosure of the facts to themselves and their confederates, who were the signatories of the articles of association, was not sufficient, and that the adoption by the directors of the agreement with Close did not bind the company to forego its claim to an account of the secret profit made by the directors, because they were not an independent body, but acting in their own interests. It was urged that the company was not in a position to recover this profit without rescinding the contract, which it could not do, because it was not in a position to restore the property. The Court of Appeal, however, held that this fact formed no bar to the company's right to recover, and they held that the four directors were jointly and severally liable to refund the £6,341.

BANKRUPTOY—PROPERTY—COVENANT FOR INDEMNITY.

In re Perkins, Poyser v. *Beyfus* (1898) 2 Ch. 182, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.), affirming, North, J., held that a covenant for indemnity contained in an assignment of a lease, is "property" of the covenantee within the meaning of the Bankruptcy Act, and, as such, assignable by his trustee, and that the damages recoverable by the assignee of such a covenant are not restricted to the dividend which a bankrupt's estate would pay in respect of the liability which was the subject of the indemnity, but extend to the whole amount of such liability.

INTEREST—VENDOR AND PURCHASER—"DEFAULT OF VENDOR"—DELAY IN COMPLETION—REMEDYING DEFECT IN TITLE.

In *Re Woods & Lewis* (1898) 2 Ch. 211, the Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.), have affirmed the decision of Romer, J. (1898) 1 Ch. 433, to the effect that where there was a delay in remedying a defect in the title unknown to the vendor at the time of the contract, and the purchaser did not draw and keep his money ready, making no interest of it; such a delay is not due to "a default of the vendor" so as to exonerate the purchaser from

paying interest on his purchase money in pursuance of his contract to pay interest in case of delay occasioned otherwise than "by default of the vendor."

PROFIT COSTS—SOLICITOR TRUSTEE—WILL—POWER TO CHARGE COSTS—LEGACY—INSOLVENT ESTATE.

In re White, Pennell v. *Franklin* (1898) 2 Ch. 217. The Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.), here affirmed the judgment of Kekewich, J. (1898) 1 Ch. 297 (noted ante p. 308), to the effect that where a solicitor trustee is empowered to charge profit costs for professional services rendered to the estate, such a power is in the nature of a legacy, and cannot be asserted in competition with creditors of the estate. How far such a legacy would be considered in the nature of payment of a statutory obligation in Ontario, and on that ground entitled to stand on a different footing, may perhaps be open to question. The decision is based on the ground that a trustee is not by English law entitled to be paid for his services.

HUSBAND AND WIFE—MARRIAGE SETTLEMENT—COVENANT BY HUSBAND THAT AFTER ACQUIRED PROPERTY OF WIFE SHALL BE SETTLED.

In re Haden, Coling v. *Haden* (1898) 2 Ch. 220, appears at first blush to be a somewhat curious case. From the head note it appears that in a marriage settlement, executed by the husband and wife, the husband alone covenanted that the after acquired property of the wife should be settled on the same trusts as were declared by the marriage settlement, and that the Court held that the after acquired property of the wife was bound by the covenant. We are inclined to think that this is hardly a strictly accurate account of the actual decision of Sterling, J., who seems, as we understand the case, to hold that the existence of the covenant in a deed executed by the wife amounted to an agreement on her part that the property should be settled in accordance with the covenant; that we take it is what is meant by the concluding words of the judgment, "it is an agreement that all the real property of the wife shall be settled, and a person assenting to such covenant would be taken to mean that the covenant shall take effect

accordingly. I hold that the property is bound by the settlement." It will be observed that he does not say bound by the covenant.

POWER OF SALE—MORTGAGE—VENDOR AND PURCHASER—DEFECTIVE EXERCISE OF POWER IN MORTGAGE—SPECIFIC PERFORMANCE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41), S. 19, SUB-S. 1 (i); SS. 20, 21, SUB-S. 2—(R.S.O., C. 121, SS. 18, 20 AND 21).

Life Interests Corporation v. *Hand-in-Hand Society* (1898) 2 Ch. 230, is a decision of Stirling, J., which shows that, notwithstanding the provision in the Conveyancing and Property Act, 1881, s. 21 (see R.S.O., c. 121, s. 21), to the effect that a sale in assumed exercise of a power in a mortgage shall not be impeached as against a purchaser by reason of the sale not being warranted by the power, or by reason of the irregular or defective exercise of the power,—a purchaser at such a sale cannot be compelled specifically to perform the contract, if he can show affirmatively that the power has not been properly exercised. In other words he cannot be compelled to rely on the statutory indemnity.

BUILDING SCHEME—RESTRICTIVE CONDITION—POSITIVE COVENANT—IMPLIED NEGATIVE STIPULATION

In *Holford* v. *Acton* (1898) 2 Ch. 240, the facts are as follows: Certain building land described as adapted for shops and business premises was put up for sale by auction, subject to a condition that the purchasers of certain specified lots should covenant with the vendors to erect within a specified time on such lots purchased by them a shop and dwelling house of a given minimum value. These lots all remained unsold, but the plaintiff purchased another lot included in the advertisement. The unsold lots subsequently became vested in the defendants, a municipal corporation, who prepared to erect thereon a fire engine station exceeding the aggregate value of the proposed shops and dwelling houses, and the action was brought to restrain this erection as being a breach of an implied stipulation on the part of the vendors, that on the lots in question only shops and dwelling houses were to be erected. Stirling, J., dismissed the action; he held it to be quite clear on the authorities that the vendors could not

have been required to erect shops and dwellings houses on the lots in question; and that the stipulation for the erection of shops and dwelling houses did not involve any implied agreement on the part of the vendor that the land should not be used for the erection of any other kind of building.

TRUSTEE—BREACH OF TRUST—UNAUTHORIZED INVESTMENT—RIGHT OF TRUSTEE TO DEFECTIVE SECURITY ON PAYING LOSS—RETIRING TRUSTEE, LIABILITY OF, FOR ACTS OF NEW TRUSTEES—SOLICITOR.

In *Head* v. *Gould* (1898) 2 Ch. 250, two or three questions relating to the law of trusts are involved. The facts of the case are somewhat voluminous, extending as they do to over nine pages of the report, but the salient points may be briefly stated thus. Clapp and Houlditch were trustees, the plaintiff an infant, being one of the cestuis que trustent. The plaintiff's mother and sister were also cestuis que trustent. The mother was in pecuniary straits, and she and her daughter urgently pressed Clapp and Houlditch to advance the trust money to them. £1,500 was in consequence advanced by them to the mother on improper security, she and her daughter giving them a covenant of indemnity: and thereafter Clapp and Houlditch refused to make any further advances, and suggested their retirement as trustees; and acting upon this suggestion, one Gould, a solicitor, and Miss Head, the plaintiff's sister, were appointed new trustees, the latter having recently attained twenty-one, and known to be under the influence of her mother, and Gould, being a friend of Mrs. Head, and a person of no substance. Under the management of Gould and Miss Head the rest of the trust fund, including the securities on which the £1,500 had been advanced, were dissipated. The action was brought against Clapp, Houlditch, Mrs. and Miss Head and Gould, to compel them to make good the plaintiff's share of the trust estate, it being claimed that Clapp and Houlditch were not only liable for the £1,500, but also for the defaults of the new trustees. Clapp and Houlditch claimed indemnity from Mrs. and Miss Head in respect of the £1,500, but contended that they could not be made liable therefor, because on payment of the amount they were entitled to the defective securities, which could not be handed to them, because they

had been dissipated by the new trustees. Miss Head also claimed indemnity against Gould on the ground that he was a solicitor, and she had acted by his advice. With regard to this latter claim Kekewich, J., was of opinion that no case for relief was made on the evidence, which showed that Miss Head had been an active participator in the breaches of trust committed by herself and her co-trustee, and did not show that she had concurred therein, merely by the advice or under the control of the solicitor. As regards the claim of Clapp and Houlditch in regard to the securities on which the £1,500 had been improperly invested, he was of opinion that notwithstanding the fact that those securities had been dissipated by the new trustees, Clapp and Houlditch were liable to make good the loss to the plaintiff, who had never assented to the improper investment, or done anything to put it out of the power of Clapp and Houlditch to obtain the benefit of the investment on making good the loss. On the question of their liability for the acts and defaults of the new trustees the case is important, as very little authority on the point is to be found in the books; but on the evidence the learned judge came to the conclusion that it did not warrant him in finding that Clapp and Houlditch had contemplated the commission of a breach of trust by the new trustees, when they were appointed, or that they were unreasonably negligent in assenting to the appointment of Miss Head and Gould as the new trustees. In order to make them liable, he holds that it is necessary to show "that they were guilty as accessories before the fact of the impropriety actually perpetrated." On this branch of the case therefore the plaintiff failed. Clapp and Houlditch's claim for indemnity against Mrs. and Miss Head was allowed. Possibly the learned judge's view in regard to the liability of Clapp and Houlditch may to some extent have been influenced by the fact that what they had done had been at the urgent solicitation of Mrs. and Miss Head, and that for yielding to their importunities they were now attacked in the name of the infant plaintiff, "but really no doubt at the instigation of those whom they honestly, though unwisely, endeavored to assist," but that is not an uncommon experience of trustees.

EVIDENCE—ADMISSIBILITY OF EVIDENCE TO CONTRADICT WITNESS AS TO IMMATERIAL POINT.

In re Haggenmachers' Patents (1898) 2 Ch. 280, was a petition presented to revoke a patent on the ground of prior user at a particular place. The petitioner's witness proved the prior user at the place named in the petition, and in cross-examination stated that he had also seen the invention used on other occasions prior to the patent. The respondent tendered evidence to contradict the witness as to the alleged user on such other occasions, but Romer, J., held it to be inadmissible, as not being material to the issue raised by the petition.

VENDOR AND PURCHASER—CONDITION AS TO RESCISSION—RESCISSION AFTER ACTION COMMENCED—COSTS.

In *Isaacs* v. *Towell* (1898) 2 Ch. 285, the plaintiff had purchased land subject to a condition that if any requisition were made which the vendor should be unable to remove, "notwithstanding any intermediate negotiation," the vendor should be entitled to rescind, and the purchaser to get back his deposit. Nothing was said in the condition as to litigation. The plaintiff objected that the defendant had misrepresented that the property was freehold, when in fact title was only shown to a term under an under lease, and on this ground the action was commenced for rescission, and return of the deposit, and payment of expenses for investigating the title. Before entering an appearance the defendant gave notice rescinding the contract and that he had authorized the auctioneer to return the deposit, which the plaintiff refused to accept. An appearance was then entered and the plaintiff proceeded with the action. Byrne, J., held that, notwithstanding the commencement of the action, the defendant was entitled to rescind the contract, the alleged misrepresentation not being established. Under the circumstances the plaintiff was held entitled to the deposit, and the costs up to the notice of rescission, and was ordered to pay the plaintiff's costs of the action subsequent to the notice.

JOINT CONTRACTORS—JUDGMENT BY CONSENT AGAINST ONE JOINT CONTRACTOR—RELEASE OF JOINT CONTRACTOR.

McLeod v. *Power* (1898) 2 Ch. 295, is an important case to be remembered in actions against joint contractors, inasmuch

as Byrne, J., decides that a consent judgment in such an action against one of the joint contractors will operate as a release of the other contractors, as against whom judgment has not been obtained. *Weall* v. *James* (1893) 68 L. T. 54, established that if the judgment against one is recovered *in invitum*, it will not have that effect as against the other joint contractors.

GAMING—PURCHASE AND SALE OF SHARES—MONEY DEPOSITED TO ABIDE THE EVENT—GAMING ACT, 1845 (8 & 9 VICT., C. 109), S. 18—(CRIM. CODE, S. 201).

In re Cronmire (1898) 2 Q.B 383, although a decision arising in bankruptcy, may be usefully referred to as governing transactions of a gaming character in reference to the sale and purchase of shares. In this case gaming transactions between a stockholder and his client for differences on the sale and purchase of shares resulted in a balance in favour of the client. The broker agreed to sell certain stock to the client in settlement of the balance due, and forwarded a contract note to the client. The stock not having been delivered, the client claimed to prove against the broker's estate in bankruptcy for damages for non-delivery of the stock; but the Court of Appeal (Smith, Williams and Rigby, L.JJ.), held that, as the balance resulting from the gambling transactions was not recoverable, there was no valid consider ation for the promise to deliver the stock, and therefore that the proof must be rejected. (See Cr. Code, s. 201.) The client had deposited money to cover any loss which might arise on the gaming transactions, a balance of which still remained in the broker's hands to the credit of the client, and as to this sum the Court of Appeal held that the client was entitled to prove against the broker's estate, as the money had not been used for the purpose for which it was deposited.

STATUTORY DUTY—FACTORY -NEGLECT TO FENCE MACHINERY—PENALTY—MASTER AND SERVANT—COMMON EMPLOYMENT—FACTORY AND WORKSHOP ACT, 1878 (41 AND 42 VIC., C. 16), S. 5, SUB-S. 4; SS. 81, 82, 86, 87—(R.S.O., C. 256, S. 20).

Groves v. *Wimborne* (1898) 2 Q.B. 402, was an action brought by a servant against his master to recover damages for breach by the latter of a statutory duty to fence machinery,

in consequence of which the plaintiff was injured. There was some evidence that there had originally been a fence provided for the machinery in question, but that it had been removed, and had not been replaced during the six months of the plaintiff's employment. Grantham, J., who tried the action, was of opinion that the action would not lie, and that the only remedy was for the penalty provided by the statute for the breach of its provisions. On appeal it was also urged by the defendant that the defence of "common employment" was open to him, and that the defendant, having provided a fence as required, was not liable for damages occasioned by the improper removal of the fence by the plaintiff's fellow servant. The Court of Appeal (Smith, Rigby and Williams, L.JJ.), however, were of the opinion that the action would lie, that the employer's duty under the Act was not only to erect, but to maintain, the fence, and that he could not shelter himself under the wrongful act of the plaintiff's fellow servant; the doubts expressed by Lord Chelmsford in *Wilson* v. *Merry*, L.R. 1 H.L.Sc. 326, as to the correctness of *Gray* v. *Pullen* (1864), 5 B. & S. 870, were held to be not well founded.

LANDLORD AND TENANT — NEGLIGENCE OF PLUMBER EMPLOYED BY LANDLORD—OVERFLOWING CISTERN.

Blake v. *Woolf* (1898) 2 Q.B. 426, presents us with a solution of the question whether a landlord is responsible to a tenant for damages sustained by the latter, through the negligence of a competent plumber employed by the landlord to repair a leak in a water cistern. The cistern in question was on the fourth floor, and the plaintiff was tenant of the ground floor, and took his supply of water from the defendant; the plaintiff having observed a leakage from the cistern, pointed it out to the defendant, who promptly employed a competent plumber to repair the defect. Through the negligence of this plumber the cistern overflowed, and the plaintiff's goods were damaged. Under these circumstances Wright and Darling, JJ., held that the landlord was not liable for the negligence of the plumber, and that he could only be liable for wilful neglect and default, and that, having employed a competent workman to repair the defect, he had discharged his duty to the defendant.

NEGLIGENCE—INJURY CAUSING DEATH—LORD CAMPBELL'S ACT (9 & 10 VICT., C. 93) (R.S.O. C. 166)—NEGLIGENCE OF BRITISH SUBJECT OUT OF THE JURISDICTION—ALIEN KILLED OUT OF JURISDICTION—ALIEN'S RIGHT OF ACTION UNDER ENGLISH STATUTE.

Adam v. *The British & F. S.S. Co.* (1898) 2 Q.B. 430, was an action brought by aliens to recover damages for the death of an alien who was killed upon the high seas, through the alleged negligence of the defendants. The action was brought under the provisions of Lord Campbell's Act, (see R.S.O. c. 166). It was conceded that, independently of that Act, the plaintiff would have no right of action, and Darling, J., was of opinion that that Act only applies to British subjects, or foreigners within the jurisdiction, and therefore conferred no right of action on foreigners out of the jurisdiction. As the learned Judge puts it, "A British Act of Parliament is not an allocution addressed urbi et orbi." The action therefore failed.

MARRIED WOMAN—LIMITED ADMINISTRATION TO THE ESTATE OF DECEASED MARRIED WOMAN—WILL OF MARRIED WOMAN—(R.S.O., C. 128).

In the goods of Leman (1898). P. 215, a woman married before the Married Women's Property Act of 1882 (45 & 46 Vict., c. 75) took effect, who, before her marriage, had been entitled to a mortgage debt, which her husband had not reduced into possession, had, during her marriage, made a will purporting to dispose of all her real and personal property. The husband applied for administration of her estate limited to the mortgage debt, he swearing that he had not authorized her to dispose of it by will. Jeune, P.P.D., made the grant limited to such estate as the deceased had not power to dispose of by will. In Ontario between 1st May, 1859, and 1st January, 1874, married women had a limited right to make wills, but since 1st January, 1874, their right to do so has been unrestricted. (See R.S.O., c. 128, s. 6; s. 7 (5).)

Correspondence.

DIVISION COURT JUDGMENTS.

To the Editor of the Canada Law Journal:

DEAR SIR,—The legislature in repealing those sections of the Division Court Act enabling a plaintiff to transfer a case to the County Court where the balance amounted to $40, and an execution had been returned nulla bona, seems to me to have put the law in an unsatisfactory state (see R.S.O. (1897), c. 60, s. 230). The execution now issues from the Division Court; but can a plaintiff pursue the same remedy for the recovery of his judgment as if the judgment was in the County Court? Can he, for example, obtain an appointment from the Clerk of the County Court for the examination of a defendant as a judgment debtor? A plaintiff may not be able to make the affidavit required by section 231, and yet think the defendant has made a fraudulent disposition of his lands. If a plaintiff cannot get an appointment from the County Court Clerk, as some judges hold, even if he get an order under section 231 for leave to proceed in the Division Court and issue a judgment summons, it is doubtful if on such examination a plaintiff can enquire into a fraudulent disposition of lands, as Division Court executions, except under section 230, do not reach lands, and the execution to be issued under a judge's order under section 231 is clearly meant only to affect goods. Yours truly,

A. SHAW.

Walkerton.

UNIFORMITY OF THE LAWS.

To the Editor of the Canada Law Journal:

Referring to the letter of your correspondent, in your number for Oct. 1, with reference to the uniformity of the laws of the several Provinces of Canada, I would call attention to a late Imperial Act. By the 31 & 32 Vict., c. 54, an Act was passed

called the Judgment Extension Act, 1868, by which a judgment obtained in England may be registered in Scotland and Ireland. The judgment so registered is to have the same effect as if obtained in the country where the cause was tried for purposes of execution, and the party subject to it cannot go behind it for the purpose of proving that the debt adjudged was statute-barred: *In re Low* (1894) 1 Ch. 147; but the judgment so registered is for the purpose of execution only: *In re Watson* (1893) 1 Q.B. 21; and therefore it would seem that a summons for examination of the debtor for disclosure, etc., could not be had upon such judgment. An Act such as the above might be passed under the provisions of the British North America Act, s. 94; and there is the question of the advisability of having such a law (see *In re Low*). Again, it is a question whether the defendant should be forced to defend an action in a province with whose laws he is unfamiliar, and, mayhap, costly as to witnesses, etc., say, for instance, an action in British Columbia against a party here in New Brunswick, The Act might be confined to causes of action arising in the country where the action is brought. The subject is worthy of discussion.

Yours truly,

EDMUND W. KAYE.

St. John, N.B.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Quebec.] CITIZENS' LIGHT & POWER CO. *v.* LEPITRE. [Oct. 6.

Negligence—Insulation of electric wires—Cause of death.

The deceased was employed as a lineman by the company, and at the time of the accident was at his work passing a wire along the ceiling of the cellar of the power house in close proximity to a large number of wires charged with a strong electric current. There was some evidence to show a possibility of imperfect insulation of the live wires, as the ends of the tie-wires by which they were attached to porcelain insulating knobs were left bare instead of being covered with insulating tapes. The witnesses declared that it was not usual to cover the ends of tie-wires in this manner, but that if such precautions had been taken the possibility of accident through coming in contact with live wires would have been decreased. The deceased was not seen to come in contact with the tie-wires, but was found dead on the floor, where he had been working, with a wound on his arm, as from a burn, and one of his shoes burnt and broken in the sole. The trial judge found that the cause of the injury might reasonably be attributed to the tie-wires being left uncovered, and rendered a verdict against the company on the ground that the presumption of fault had not been rebutted, and it had not been shown that deceased had been guilty of any imprudence which might have caused him to receive an electric shock.

Held, that there was sufficient evidence to sustain the findings of the trial judge, as it appeared that an obvious precaution for the prevention of accidents by live wires had been neglected by the company, whose duty it was to take the utmost care for the prevention of injury being caused by the dangerous material with which they were dealing. Appeal dismissed with costs.

Allan, for appellant. *Desmarais* and *Belcourt*, for respondent.

Quebec.] VIAU *v.* THE QUEEN. [Oct. 13.

Appeal—Jurisdiction—Supreme Court—Criminal law—New trial—Criminal code, 1892, ss. 742-750, 55 & 56 Vict., c. 29, s. 742.

An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal under the provisions of the criminal code, 1892, s.s. 742 to 750, inclusive.

The word "opinion" as used in the s. 742, s-s. 2 of the criminal code, 1892, must be construed as meaning a decision or judgment of the Court of Appeal in criminal cases.

Cannon, Q.C., for Crown. *Poirier*, for prisoner.

Ontario.] HYDE *v.* LINDSAY. [Nov. 2.

Statute—60 & 61 Vict., c. 34—Application to pending cases.

60 & 61 Vict., c. 34, which provides that in cases decided by the Ontario Courts no appeal will lie to the Supreme Court of Canada unless title to land or some interest therein is in question, or more than $1,000 is in controversy, or (as in other cases specified) received the royal assent on June 29th, 1897. In this case the trial was concluded and judgment reserved on June 25th, 1897. The case eventually went to the Court of Appeal, whose judgment was pronounced in the spring of 1898, and an appeal was taken therefrom to the Supreme Court. On an application to KING, J., in Chambers, to approve of the security for costs on said appeal, the respondent claimed that the above statute prohibited the appeal, as the judgment appealed from gave the respondent less than $1,000. The learned judge referred the matter to the Court.

Held, that the statute did not apply to the case, as the proceedings therein were pending when it came into force, although the judgment appealed from was not pronouced until afterwards. *Hurtubise* v. *Desmarteau*, 19 S.C.R. 562: *Couture* v. *Bouchard*, 21 S.C.R. 281; *Williams* v. *Irvine*, 22 S.C.R. 108; *Cowan* v. *Evans*, 22 S.C.R. 331, followed.

Belcourt, for the motion. *Pratt*, contra.

Province of Ontario.

COURT OF APPEAL.

Practice.] CRAWFORD *v.* BRODDY. [April 16.

Costs—Appeal as to—Error in principle—Recovery of land—Construction of will—Improvements under mistake of title—Reference.

In this action the plaintiffs claimed a certain farm, a portion of the estate of their father, under an executory devise over to them in the will of their father, after the life estate of their brother. The defendants were the executors of the will of the brother's grantee, and were in possession of the farm, asserting that their grantor's estate was not a life estate, but in fee simple or fee tail. The plaintiffs claimed in the alternative, as two of the heirs-at-law of their brother, upon the ground that the conveyance to the defendants' testator was void for mental incapacity and fraud. The plaintiffs succeeded upon their first contention, and were awarded possession of the farm, subject to payment for the defendants' improvements, less the rents received by them.

Held, that, as the estate of the original testator was not all before the Court, nor the executors, nor all the persons representing that estate, it was impossible to give costs out of the estate, in the ordinary sense, and an appeal lay from the judgment of the High Court ordering the costs to be paid out of the farm in question, which was wrong in principle. The costs should be disposed of as in an ordinary action for the recovery of land, in which the

plaintiffs had succeeded, subject to a claim for and a balance found due to the defendants for improvements under mistake of title. There should be no costs of the trial, to either party, because, although the plaintiffs ultimately succeeded upon one claim, they failed upon another; the plaintiffs should have the costs of their appeal to a Divisional Court, upon which they succeeded, although they renewed their alternative contention there; there should be no costs to either party of the reference, which was for the benefit of both, for, although the defendants had succeeded in establishing a lien for improvements, they were not in the position of a mortgagee or chargee who has taken possession in order to obtain payment of his debt; and the plaintiffs should have the costs of the motion for judgment on further directions. Judgment of FALCONBRIDGE, J., reversed.

J. C. Hamilton, for appellants. *W. H. McFadden* and *T. J. Blain*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C.] MERCER *v.* NEFF. [Oct. 20.

Executors and administrators—Will—Devise—Power to mortgage—Payment of debts—Trustee Act—Devolution of estates Act.

The testatrix devised land to her executor and trustees, and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land, and divide the proceeds among her children.

Held, that this was a devise of the farm out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns," the executor had the right by virtue of s. 16 of the Trustee Act, R.S.O. c. 129, to mortgage for debts: and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19.

In re Bailey, 12 Ch. D. 273, and *In re Tanqueray*, 20 Ch. D. 478, followed.

The Devolution of estates Act, R.S.O. c. 127, does not apply to a case where the executor acts under the will and the provisions of the Trustee Act.

J. R. Roaf, for plaintiff. *W. H. Irving*, for defendant Richardson. *C. H. Porter*, for other adult defendants. *A. J. Boyd*, for infant defendants.

Rose, J.] CONFEDERATION LIFE ASSOCIATION *v.* LABATT. [Oct. 25.

Notice of trial—Close of pleadings—Reopening—Order permitting third parties to defend.

Where a third-party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiff to be tried at Toronto without a jury, and notice of trial given before the plaintiffs were aware that such third-party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:

Held, that the order made upon such motion, which permitted the third

parties to come in and defend, and directed that the issue between the defendant and the third parties should be tried at the same time as the action, reopened the pleadings, and they were not closed (the third parties having delivered a defence) until the expiration of the time for replying to that defence. The duty of the plaintiffs then was to draw up a new record of the pleadings, including in it the defence of the third parties, enter the case again for trial, and give notice for trial to the defendant and third parties, under Rule 542.

Nasmith, for plaintiff. *Rowell*, for defendant. *Kilmer*, for third parties.

Boyd, C.] DELAP *v.* ROBINSON. [Oct. 31.

Interim injunction—Undertaking for damages—Foreign plaintiff.

Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction.

Arnoldi, Q.C., for the plaintiff. *C. C. Robinson*, for defendant.

Boyd, C.] IN RE HUMPHRIES, MORTIMER *v.* HUMPHRIES. [Oct. 31.

Payment into court—Infants' moneys in hands of executor.

Where infants are entitled to maintenance out of a fund in the hands of the executor of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into court.

Kingsmill v. *Miller*, 15 Gr. 171, and *Governesses' Benevolent Institution* v. *Rusbridger*, 18 Beav. 457, followed.

E. D. Armour, Q.C., for applicant. *H. F. Hunter*, for executor. *Langton*, Q.C., for residuary legatees. *F. W. Harcourt*, for infants.

IN RE SUPREME LEGION SELECT KNIGHTS OF CANADA.

Boyd, C.] CUNNINGHAM'S CASE. [Oct. 31.

Life insurance—Friendly society—Liquidation—Master's report—Practice—Notice of filing—Appeal—Total disability benefit—Repeal of provisions as to—Assessments—Non-payment—Suspension—"Fixed dates"—Time—Notice.

The provision of Con. Rule 769 that notice of filing a master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute.

Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R.S.O., c. 203, notice of filing the report given in the *Ontario Gazette* and other newspaper, pursuant to section 193 of that Act, is not tantamount to personal service.

Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and repealed by the society during the membership of the insured;

Held, that he was bound by such action.

Baker v. *Forest City Lodge*, 28 O.R. 238, 24 A.R. 585, followed.

By s. 165 of R.S.O., c. 203, it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given, as mentioned in sub-section 2, and default thereafter for not less than thirty days. The meaning is that in the case of assessments, which by implication are of fixed amount, and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure.

By the constitution and rules of the society, the amount and frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month, and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble, according to the needs of the society.

Held, that the assessments could not be regarded as "payable at fixed dates," and as, in the case of the member whose standing was in question, the notice to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred.

Hartley v. *Allan*, 4 Jur. N.S. 500, 31 L.T.O.S. 70, 6 W.R. 407, not followed. *Llewellyn* v. *Ross*, 35 Beav. 592; *Re Maxwell*, 1 H. & M. 615; *St. Aubyn* v. *St. Aubyn*, 1 Dr. & Sm. 620; and *Jones* v. *Ogle*, L.R. 8 Ch. 198, specially referred to.

A. B. Cunningham, for claimant. *J. H. Hunter*, Insurance Registrar, in person. *D. F. MacWatt*, the receiver, in person.

Boyd, C., Robertson, J.] [Nov. 10.

MALCOLM *v.* PERTH MUTUAL FIRE INS. CO.

Malicious prosecution—Reasonable and probable cause—Burden of proof—Nonsuit.

In an action for the malicious prosecution of a charge of arson against the plaintiff,

Held, affirming the judgment of ROSE, J., ante p. 413, 29 O.R. 406, that

the burden was on the plaintiff to show that the defendants acted without reasonable and probable cause, and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited.

Brewster, for plaintiff. *J. P. Mabee*, for defendants.

Boyd, C., Robertson, J.] ANDERSON *v.* HENRY. [Nov. 10.

Distress for rent—Delay in sale—Distress left on demised premises—Bond by tenant—Abandonment—Goods in custodia legis.

Delay in the sale of goods distrained for rent does not prejudice the distress, if there be no fraud or collusion between the landlord and tenant to defeat the rights of third parties.

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep, and deliver the chattels and crops, and not to remove, or allow them to be removed from the premises, and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary. Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudices the mortgagee. *McIntyre* v. *Stata*, 4 C. P. 248 ; *Roe* v. *Roper*, 26 C.P. 76 ; and *Whimsell* v. *Giffard*, 3 O.R. 1, distinguished. *Langtry* v. *Clark*, 27 A.R. 280, distinguished and not followed.

A. H. Macdonald, Q.C., and *Drew*, for plaintiffs. *E. F. B. Johnston*, Q C, for defendants.

Meredith, C.J.] CAMPBELL *v.* DUNN. [Nov. 12.

Costs—Interlocutory motion—Costs out of estate—Consent on judgment without costs—Effect of.

Certain interlocutory orders awarded "costs to all parties out of the estate." At the hearing the parties settled the action, and a consent judgment was entered, which directed that "the parties other than the official guardian do pay their own costs." The plaintiffs, however, claimed the costs awarded by the interlocutory orders.

Held, reversing the ruling of the local master at Woodstock, that the disposition of the costs made by the consent judgment must be taken to apply to all costs of the litigation, including those upon interlocutory motions, and that the plaintiffs were not entitled to tax the costs which they claimed.

F. A. Anglin, for plaintiffs. *J. H. Moss*, for adult defendants. *A. J. Boyd*, for infant defendants.

SURROGATE COURT.

COUNTY OF WATERLOO.

MILLER *v.* MILLER.

Proving will in solemn form—Parties—Procedure—Attestation of will—Revocation—Costs.

S. M. having made a second will, attested by one witness only, and which contained a clause revoking the first will, tore off his signature to the first will in presence of a witness, leaving the greater part of the letter "S" only as part of the signature, believing that he had made a subsequent valid will.

Held, that the first will was not revoked, and should be admitted to probate.

Held, also, on the evidence of one of the witnesses to the execution of the will, although he could not distinctly remember that he and the other subscribing witness signed their names as witnesses in presence of the testator, and on the presumption of law in such case, the Court having power to draw inferences of facts, that the proof was sufficient although the attestation clause was incomplete.

Costs of all parties allowed out of the estate, except costs of contestant, in connection with the incapacity of the testator, which although set up, was not established.

[BERLIN, Aug. 5—CHISHOLM, SUR.J.

This case was tried at the June sessions of the County Court of Waterloo, without a jury. The defendant by his answer, (1) put the plaintiff to proof of the several allegations contained in the petition, and of the facts upon which probate of the alleged will may be granted. (2) Stated that if the deceased did execute the said alleged will he was not at the time of such execution of sound and disposing mind and understanding. (3) That if it was a valid will at the time of the execution thereof, it was revoked by the testator in his lifetime by the act of tearing off his signature thereto if the same had been ever affixed thereto, and the said alleged will was not the will of the deceased at the time of his death.

Clement, for petitioner. *Morphy*, for defendant, Thos. Miller. *McBride*, for defendant, Matilda Playford. *Dalzell*, for infant defendants.

CHISHOLM, Surr. Judge —The petition sets forth the name of the alleged testator, and the date of his death. There can be no doubt from the evidence that the alleged testator died on March 18th, 1897, and that he had at the time of his death his fixed place of abode at the Township of Wellesley in the County of Waterloo. Then did he, as alleged, in his lifetime duly make his last will and testament, and is the document submitted for probate, bearing date, July 6th, 1889, with most of the signature torn off his last will and testament? The evidence of Mrs. Catharine Miller proves the identity of the paper produced with that in the possession of deceased on the day when he employed Boomer to draw a second will for him. She says, "After Mr. Boomer left I went into deceased's room; he asked me to put his papers away, . . . and I took this 1889 will, . . I handed it to him, and he then tore his name off. She recognized the paper, exhibit D, as the paper he tore; she says she burned the piece that was torn off; it was in little pieces, they were lying on the bed, and she burnt them. She says she laid this torn will in a drawer in "our" bedroom; it is a desk that this drawer is in; it was laid in the drawer in the presence of her husband as well as of herself; this was in January

1891. She says she does not remember looking at it again until October of last year (1897). Alexander Miller says he saw the will of 1889 for the first time the evening of the day Boomer was at the house, his wife had it; he noticed the signature was torn off; it was dropped into his desk, and it lay there from that time; it was not referred to again until he got word from Mr. Morphey that the other will was "no good;" thinks it was "somewhere" about the middle of October.

Then the two witnesses to this document, namely F. Colquhoun and Thomas Hilliard, recognize their signatures as witnesses to the execution of the document, Mr. Colquhoun recognizes the writing in the instrument as that of a Mr. Hunt, who was at that time (the date of the instrument) his clerk, he also recognizes that the date in the instrument is "filled in" in his (Colquhoun's) own handwriting. I have no doubt from the evidence that this instrument produced was signed by the deceased Samuel Miller, and that he himself tore the signature off.

Then was it executed as required by the Wills Act, at that time R. S. O. 1887, c. 109, s. 12. There can be no question as to the position of the signature of the testator, it was placed at and after the end of the will with only two blank ruled lines intervening between the signature and the concluding word of the will and opposite to what attestation clause there is. Then the signatures of the said two witnesses are subscribed under the words "Signed, published and declared by the said Samuel Miller, the said testator, in the presence of," but the said Act requires that "no will shall be valid unless the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The attestation clause says it was "signed published and declared by the said Samuel Miller, the said testator, in the presence of." Then follow the signatures of the witnesses. It is silent, however, as to the two witnesses being present at the same time, and attesting and subscribing the will in the presence of the testator. The testator might subscribe the will in presence of the witnesses, yet the witnesses might not subscribe their names as witnesses in presence of the testator. This may be supplied by evidence or from inferences of fact and presumptions. Does the evidence of the witnesses to the will supply this defect? Mr. Hilliard can say nothing as to this. Mr. Colquhoun says, according to reporter's notes: "I say it was executed on the day of its date by Samuel Miller in presence of Mr. Hilliard and myself at Waterloo." Q.: "What do you say about the signing of the witnesses' names, when were they signed?" A.: "At the same time, and in the presence of each other, it was properly executed." Q.: "You and Mr. Hilliard signed your names in the presence of the testator, and in the presence of each other, then you observe that the signature is torn off?" A.: "Yes, part of the S is still there." In my notes of the evidence I have it, "It was excuted on the day of its date at the town of Waterloo, witnesses' names were signed at the time of execution in presence of testator and in presence of each other." In cross-examination of Mr. Colquhoun by Mr. Morphy: Q.: "I suppose you had forgotten that you had witnessed

this will until you saw it lately? A.: "Until I saw it." Q.: "And the details of the execution of it are still in the clouds to you?" A.: "Yes." Q.: "You couldn't pretend to say what took place so long ago?" A.: "I am satisfied it is correctly executed in the usual way." Q.: "Do I understand you cannot fix your mind as to the sitting down and executing it?" A.: "I don't know." Q.: "From your methods and knowledge of the law you knew it was properly done?" A. "Yes, and my signature." Q.: "Not from recollection of what actually took place, but what you see on paper?" A.: "What is on the paper."

The learned Judge then referred to the following authorities: Cooke's Prob. Prac., 5th ed. (1866), 61; Jarman on Wills, 5th ed., 91; Taylor on Evidence, 8th ed., 905; *Doe* v. *Davies*, 9 Q.B. 648, 650; *Crawford* v. *Curragh*, 15 U.C.C.P. 55 (in which the attestation clause was similar to that in the present case); *Re Young*, 27 O.R. 698; *Little* v. *Aikman*, 28 U.C.R. 337.

It is worthy of remark and observation that in this case Mr. Colquhoun, a solicitor of long standing and of the best reputation, is one of the witnesses to the execution of the will by the testator Samuel Miller. Mr. Colquhoun drafted the will, got his clerk to engross it, leaving the date blank, which was afterwards filled in by Mr. Colquhoun in his own handwriting. I hold that the will is properly executed.

[No evidence was offered as to the second objection.]

As to the third and last objection, that it was revoked by the testator in his lifetime by the act of tearing off his signature. There is no doubt that the signature was torn off by the testator with the intention of revoking the will, under the belief that he had made a subsequent and a valid will. This subsequent testamentary instrument is put in as exhibit "C;" it contains a clause revoking all former wills, etc., by him at any time theretofore made, and would doubtless have had such effect, but it is invalid on account of its having only one witness. The testator, however, had no intention in tearing off his signature of dying intestate, which would be the effect if he had revoked the will of 1889 absolutely.

Mr. Boomer, who drew this void will, says that after having signed it, the testator said "he supposed it (the other will) might as well be destroyed," to which he, Boomer, assented. Mrs. Alexander Miller says: "After Mr. Boomer left I went into deceased's room; he asked me to put his papers away; he asked me if I ever read a will, I answered "No"; he said he had willed his property in this 1889 will to his daughter, now to-day he had deeded it to her, and he had made a new will, and I took this 1889 will, and he said perhaps my husband had never read a will, that perhaps it might help him. I handed it to him, and he then tore his name off. He said the will that I had locked up took the place of that one. I had locked up the 1891 will in a dressing-case in his bed-room."

It is laid down in Jarman on Wills, 5th ed., 119-20, "When the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the egal effect of the transaction, and therefore, if the will intended to be substi-

tuted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force." "The act of destruction is referable not to any abstract intention to revoke, but to an intention to validate another paper, and as the condition upon which alone the revocation was intended to operate is in neither case fulfilled, in neither does the animus revocandi exist." There are many other authorities to the same effect. *Dantzer* v. *Crabb*, 42 L.J. Rep. 53; *Ex parte Earl of Ilchester*, 6 Rev. Rep. 138; *Powell* v. *Powell*, 35 L.J. Rep. 100.

I hold finally that said will of late Samuel Miller of date the 6th day of July, 1889, has not been revoked, and that it is a properly executed, valid and existing will, and that it should go to probate as prayed for.

The learned Judge then allowed all costs out of the estate, except the costs of the contestant in connection with the incapacity of the testator, which, although set up, was not established.

COUNTY COURT.

COUNTY OF YORK.

REG. *v.* WOTTEN.

Liquor License Act—R.S.O.—Temperance beverage—Light beer—Percentage of alcohol.

Held, that it is illegal, without a license, under the guise of its being a temperance beverage, to sell a liquor which is capable, if freely drunk, of producing even the incipient stages of intoxication, even though it only contains from two to three per cent. of alcohol.

[TORONTO, Nov. 3, 1885—MCDOUGALL, Co.J.

This was an appeal to the County judge of the county of York, sitting in Chambers, from a conviction made by G. T. Denison, police magistrate of the city of Toronto, against the appellant, David Wotten, for an alleged offence against the Liquor license Act, s. 40 (R.S.O., c. 181), as amended by 47 Vict., c. 34, s. 8, (O.) (now R.S.O. c. 245, s. 49.)

The information was laid by the license inspector for Toronto, and charged that the appellant, David Wotten, on the 6th Sept., 1885, at the city of Toronto, in the county of York, unlawfully did keep liquor for the purpose of sale, barter, and traffic therein, without the license therefor by law required.

The liquor in question, as appeared from the evidence, was a beverage known as Blue Ribbon beer, and a keg of it was seized on the premises occupied by the appellant, at the Exhibition grounds, by the license inspector. The appellant had no license for the sale of liquors, and admitted both the possession and sale of the liquor in question herein, but affirmed that the same was not an intoxicating drink, and therefore its possession or sale, or the keeping of it for sale by a person not holding a liquor license, was not prohibited by law. The police magistrate, after hearing evidence, convicted the appellant and imposed a fine of $20 and costs. Appeal from this conviction..

Maclaren, Q.C., for Crown.

MCDOUGALL, Co. J.—As the question involved in this appeal is of con-

siderable moment to a number of persons other than the appellant, there being, I am informed, a large number of cases, some thirty or forty I believe, adjourned to await the result of the present appeal, I decided, instead of forming my conclusions from reading the evidence taken before the police magistrate, to hear the parties and their witnesses, and allow what has amounted practically to a new trial.

Except the testimony of two professional analysts and of two witnesses called in rebuttal the mass of evidence adduced before me consisted of that most unsatisfactory, inconsistent and highly contradictory class of evidence known as expert testimony, or as it is more properly and correctly styled "opinion evidence." Some thirty-three medical men were called one after the other, and each gave his opinion as to whether a fermented malt liquor containing a certain percentage of alcohol is intoxicating or not. In answering this query some were outspoken, some were cautious, some hedged their answers about with conditions; others wanted preliminary admissions or concessions made before they could make up their minds. What was meant by intoxication? Was the liquor to be taken on a full or empty stomach? Was it with reference to the effect upon a person unaccustomed to the use of intoxicating liquors, or were we asking as to its effect upon more seasoned vessels? Then the changes were successively rung upon the words inebriation, stimulation, exhilaration, obfuscation and intoxication. I was told that there was a great difference between becoming intoxicated in the popular sense, and in becoming intoxicated in the medical sense. I had the various stages of intoxication graphically described to me, and the capacity of the human stomach earnestly considered with reference to the number of pints, or quarts of liquid it might or could contain. The probable effect of drinking a large quantity of Blue Ribbon beer at one draught, as compared with drinking a glass every ten minutes, was sought to be established by the opinions of skilled witnesses. The analysts, had by their testimony, fixed the percentage of alcohol in the liquor seized, and I had the virtues and evil properties of this ingredient considered in every phase—its effect upon the human system, upon the circulation, upon the brain, and upon the legs. I was assured that a man might not be considered intoxicated whose legs were a little groggy, so long as his brain was clear, and I was also informed that giddiness and talkativeness, coming on after drinking certain quantities of alcoholic beverages, were, in a medical sense, no reliable indication of insobriety. One medical gentleman asseverated that in his opinion one could drink enough liquor containing 2½ to 3 per cent. of alcohol to burst, but as to discovering any symptoms of intoxication, the earlier calamity would supervene and prevent further investigation. I was told that vomiting and rejection by the stomach of liquor of the strength of that described to the witnesses, would most certainly follow rather than any symptoms of alcoholism. On the other hand I was most solemnly assured by four or five most eminent physicians that two or three glasses of this liquor would certainly produce symptoms of intoxication, and four or five glasses would successfully inebriate the patient.

It is upon contradictory evidence of this character that I am to form my conclusions as to the quality and properties of the liquor seized in the possession

of the appellant, and for the keeping of which he has been duly convicted by the police magistrate. Mr. Shuttleworth, the analyst called by the prosecutor, analysed a portion of the liquor seized, and states that he found it contained 2.97 per cent. of alcohol. Mr. Ellis, public analyst, also examined a portion of the same liquor, and states he found but 2.14 per cent. From these conflicting analyses, counsel agreed that it would perhaps be fair to treat the liquor seized as containing 2.5 per cent. of alcohol, this being the average of the two reports. It also appeared from the evidence of Mr. Heys, lecturer on chemistry, called by the appellant, that beer of this quality, if kept for a short time, might by reason of fermentation still proceeding up to a certain period, develop an increased percentage of alcohol, say to the extent of .33 per cent. beyond the quantity present when turned out of the brewery. Mr. Davies, the brewer, who manufactures the Blue Ribbon beer, when called by the prosecutor, also admitted this fact. He said fermentation and production of alcohol would go on unless the beer had been treated by a special process, which, however, could only be applied to it when bottled, and this fermentation must be expected unless the beer is kept in a very cool place.

From this evidence I do not think it at all unfair to assume that 3 per cent. would be taken as approximately the maximum strength of this beer, as possibly 2 per cent. may be said to be minimum strength. It was established by clear evidence that with a strength of 2.5 per cent. of alcohol an imperial pint of this liquor would contain ½ oz. of alcohol, and with 3 per cent. the quantity of alcohol would be three-fifths of an ounce; an imperial quart would, therefore, contain from 1 oz. to to 1 1-5 oz. of alcohol. Now, it was shown by a large number of the medical witnesses called on both sides that a person unaccustomed to the use of liquor, and taking it upon a comparatively empty stomach, would exhibit signs of intoxication if he took a drink of any liquor containing from one to two ounces of alcohol. Some thought one and a half to two ounces would undoubtedly produce that effect; others that one ounce would be sufficient to indicate perceptibly to a third person observing the patient that he, the patient, had been drinking. In other words, the first stages of intoxication, as it is popularly known, would be produced. This being the case, from one quart to three pints of Blue Ribbon beer would render a person unaccustomed to the use of liquor, perceptibly under the influence of liquor, though not drunk. The first stages of intoxication would be produced; and such a person would, in a large proportion of cases, become excited, talkative, perhaps giddy and unsteady on his legs, though possibly not incapacitated from performing all his ordinary duties.

In view of this evidence, and the fact that this liquor is one that may increase perceptibly in strength if exposed to heat or motion, I can come to no other conclusion than one adverse to the appellant's contentions. It would be opening a wide door to a fraudulent evasion of the Act, and its wise provisions for controlling and regulating the sale of and traffic in intoxicating liquors if a liquor which contained even so small a percentage as 2½ to 3 per cent. of alcohol could be openly offered for sale without a license in every grocery, house, or shop in the community. The law is not made alone to regulate what shall be sold to the man accustomed to the use of liquor, but is equally for

those who are unaccustomed to its use, and these also must be protected. No one can be allowed to offer for sale without a license, under the guise of a temperance beverage, a liquor which is capable, if freely drunk, of producing even the incipient stages of intoxication. I think Blue Ribbon beer will do this if used freely by the class of persons last mentioned, though doubtless its effects upon more seasoned drinkers may be questionable. Upon the whole case and from the whole evidence I must decide that this beer is an intoxicating liquor, and that the appellant has been properly convicted.

McDougall, Co.J.] VERNEY *v.* GUTHRIE. [Nov. 10.

Easement—Non-reservation—Derogation from grant—Drainage.

Plaintiff and defendant owned adjoining houses, which originally belonged to one owner The defendants' house was drained by a branch drain which went under the plaintiff's house and connected with the plaintiff's drain, which drain, so used for both premises, but on plaintiff's land, emptied into the street sewer. There was no mention of the drain in any of the conveyances, and neither party knew of the position of the drains until shortly before the action was commenced.

Held, that the privilege to drain defendant's house through plaintiff's premises not being an easement of necessity, and there being no reservation of any such right, the defendant had no right to use the drain on the plaintiff's premises, and he was liable for damages resulting to plaintiff by such user. *Wheeldon* v. *Burrows*, L.R. 12 Ch.D. 49, followed.

D. T. Symons, for plaintiff. *Smoke*, for defendant.

Province of New Brunswick.

SUPREME COURT.

McLeod, J.] MELLIN *v.* MUNICIPALITY OF KINGS. [Oct. 29.

Practice—Striking out name of defendant—Action in tort—Power to plaintiff to enter nolle prosequi—60 Vict. c. 24, s. 145.

The Court or a judge has no power to strike out the name of a defendant in an action ex delicto, s. 145 of 60 Vict. c. 24, being limited to an action on contract. But the plaintiff may get rid of it in the action by entering a nolle prosequi, and this may be done at any time, even after verdict.

A. A. Stockton, Q.C., and *J. P. Byrne*, for plaintiff. *A. S. White*, Solicitor-General, for defendants.

Full Bench.] FIDELE *v.* LEGERE. [Nov. 1.

Costs of County Court appeal—Next friend—Attachment.

Court refused an attachment against the next friend of the respondent for non-payment of appellant's costs on a County Court appeal, holding that they should be added to the appellant's costs in the Court below, and recovered by attachment out of the County Court.

J. D. Phinney, Q.C., in support of the motion.

Full Bench.] EX PARTE TURNER. [Nov. 4.

Payment of debt by instalments—Future earnings.

The Court made absolute an order nisi to quash an order made by a Clerk of the Peace under Act 59 Vict., c. 28, s. 53, for the payment of a debt by instalments against a laborer, holding, as in *Ex parte Killam*, 34 C.L.J., 390, that the Act does not contemplate future earnings or income that may be uncertain.

M..G. Teed, in suport of order nisi. *J. H. Dickson*, contra.

Full Bench.] EX PARTE JACOBS. [Nov. 4.

Disclosure—Service of notice on agent—Proof of agency.

J. H. B. acted as attorney of the applicant, the plaintiff, in a suit in the City of Fredericton Civil Court, and after judgment gave directions as to the suit against the bail therein.

Held, on motion to make absolute an order nisi for certiorari to remove an order discharging the defendant from arrest under the Act 59 Vict. c. 28, that service of the disclosure notice on J. H. B , as agent of the plaintiff, was sufficient proof, of the said J. H. B. having acted as above having been made before the County Court Judge, who granted the order of discharge on the day on which the summons against the bail was returnable (the defendant having been in the meantime rendered in discharge of his bail). Order nisi discharged.

J. H. Barry, in support of order nisi. *O. S. Crocket*, contra.

Full Bench.] MACPHERSON *v.* WALLACE. [Nov. 8.

Trover—Title to property—Res judicata.

In an action of trover for the conversion of a carload of wood, brought by appellant against one R., the judge of the York County Court, who tried the cause without a jury, found the property in defendant. An appeal to the Supreme Court from this finding was dismissed. Appellant subsequently proceeded to trial in another action of trover against the present respondent, W., who purchased the wood from R., the action against W. having been commenced simultaneously with that against R. On the trial the judgment in the action against R. was proved, and the County Court judge nonsuited the plaintiff, holding that the property having been found in R. in the action first tried, and W. having purchased from him, the matter was res judicata.

Held, on appeal, that that the nonsuit was right, and appeal dismissed with costs.

C. E. Duffy, in support of appeal. *F. St. John Bliss*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] O'CONNOR *v.* FAHEY. [Oct. 20.

Administration of estates—Q. B. Act, 1895, Rule 766—Discretion of the Court.

This was an application under Rule 766 of the Queens' Bench Act, 1895, by a legatee under the will of the deceased for an order for the administration of his estate on the ground that more than a year had elapsed from the testator's death, and the legacy had not been paid. The only property out of which the legacy could have been paid was a hotel in the city of Winnipeg, which the executors were directed by the will to sell as soon after the testator's death as they might deem proper, and as soon as they could conveniently do so without sacrificing the estate. The executors had tried to sell the property, but had so far been unable to do so. There were also unpaid creditors' claims to a large amount.

Held, that the Court had a discretionary power to grant or refuse the order, and that, as the executors were acting in the administration of the estate, and were in no default, the application should be dismissed with costs.

Elliott, for applicant. *Culver*, Q.C., and *West*, for executors.

Province of British Columbia.

SUPREME COURT.

Irving, J.] TOWN *v.* BRIGHOUSE. [Sept. 14.

Practice—Agreement for sale—Lis pendens—Cancellation of—R.S.B.C. c. 111, s. 85.

Action for specific performance of an agreement for sale of land. The plaintiff entered into an agreement with an alleged agent of defendant for purchase of certain land belonging to defendant, who repudiated the agreement. Another agent of defendant then made a sale of the same property, and as the conveyance was about to be completed the plaintiff commenced his action for specific peformance, and filed a lis pendens against the property. The defendant then applied under the provisions R.S.B.C. c. 111, s. 85, to have the lis pendens cancelled.

Held, that an order will not be made cancelling a lis pendens under s. 85 of the Land Registry Act in a case where damages would not be complete compensation.

As the learned judge had doubts as to the plaintiff's ultimate success the lis pendens was not cancelled, but the plaintiff was ordered to give an undertaking to abide by any order the Court or a judge may make as to damages

should the Court or judge hereafter be of opinion that the defendant has incurred any, by reason of the registration of such lis pendens, and furnish security in the sum of $800, conditioned for the fulfilment of said undertaking. Conditions were also imposed on plaintiff to speed the cause.

Martin, Attorney-General, for defendant. *C. B. Macneill*, for plaintiff.

Book Reviews.

Practice Forms in Proceedings under the Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario, the Surrogate Court Rules, the statutes of Ontario, and the statutes of the Dominion of Canada, by EDWIN BELL, L.L.B., of Osgoode Hall, barrister-at-law, and HERBERT LANGELL DUNN, B.A., of Osgoode Hall, barrister-at-law, one of the examiners of the Law Society of Upper Canada. Toronto, Canada Law Law Journal Co., 1898.

Some books are useful to the practitioner, whilst others may be regarded as indispensable. This volume belongs to the latter class. It consists of a collection of over 700 forms and precedents for use in proceedings in the High Court, the County Courts and the Surrogate Courts. While the book has been prepared especially for use in Ontario it will prove a great assistance to the profession in the other provinces. Every solicitor knows what a great advantage it is to have at hand a precedent which he may follow, or to which he may refer in drawing a pleading, judgment, order, or other document. Some active practitioners no doubt make collections of forms for their own use, but even these will find in the book much that is useful and not readily accessible elsewhere, there being in addition the advantage of having the forms collected in a convenient volume well arranged and indexed.

A glance over the index shows the wide field covered. In addition to the forms required in every day proceedings, attention is given to the less frequent practice in proceedings relating to Certiorari, Prohibition, Habeas Corpus, Municipal Drainage, Quashing By-laws, Quashing Convictions, Quo Warranto, Winding-up, and other special subjects. A number of useful forms of pleadings are also given. The editors have done their work with great care and accuracy, and have provided an unusually good index. The paper, printing and binding, are of the very best description; and we think we can congratulate the editors upon having produced one of the most useful handbooks ever published in this province.

The Law Quarterly Review, October, 1898. Stevens & Sons, London.

The articles in the *Law Quarterly Review* for October take so wide a sweep through the various outlying regions of the globe in which Britain is directly or indirectly interested, that one might almost surmise that the editor has succumbed to a mild attack of what may be styled "Lues Imperialistica"—a malady which during the last few months has doubtless been raging with unusual violence on the banks of the Thames. If we except his own ever-welcome comments upon current cases of interest, and a short article in which Mr. Griffith acutely analyses the law which defines the position of a surety

after time has been given to the principal debtor, the entire number is taken up by discussions of matters juridical and quasi-juridical, far beyond what are known in English law as the "Four Seas."

The place of honour is occupied by a lengthy discussion of the judicial crisis in the Transvaal, from the pen of Mr. J. W. Gordon. Constitutional lawyers, both in Canada and the United States, will be much interested in this account of high-handed fashion in which President Kruger defeated the attempt of Chief Justice Kotze to arrogate to his Court the power of testing the validity of statutes by considering whether their provisions were or were not in harmony with the "Grandwet." This law, though in some respects organic, is apparently not in the same category as the British North America Act, or the Constitutions of our southern neighbors, but rather analogous to the Magna Charta, and the Chief Justice was therefore quite unwarranted, on strictly technical grounds, in taking the stand he did. India is represented by an article in which Mr. Rattigan puts forward an urgent and persuasive plea for an extension of the system of codification, which he maintains to be the only remedy for the lamentable vagueness of the law in that great dependency. Even those who are opposed to codification in England and on the continent will, we think, admit the desirability of finding some means of imparting greater fixity to rights and obligations in a country in which the uncertainties of the practical administration of justice are aggravated indefinitely by the fact that, if Mr. Rattigan is to be believed, a suitor has to consider very anxiously and carefully the mental proclivities of his prospective judge! The article by Mr. Lefroy, which was noticed ante. p. 677, carries us to the western hemisphere, but India comes to the front once more in a discourse by Mr. Petheram on "English Judges and Hindu Law," in which some curious instances are given of the deplorable errors which result from committing to English judges the function of administering a system of jurisprudence which, with all their indüstry and concientiousness, they are very apt to misunderstand. The East also claims attention in the next contribution, in which a learned Japanese lawyer has something of interest to tell us about the application of international law during the late war between his country and China. The number concludes with an obituary monograph by M. Enest Nys upon M. Rivier, one of the most distinguished of the Continental authorities on Roman and international law.

Jervis on Coroners, 6th edition, by RUDOLF E. MELSHEIMER, barrister-at-law; London, Sweet & Maxwell, limited, 3 Chancery Lane; Stevens & Sons, limited, 119-120 Chancery Lane, 1898.

This work rearranges the whole of Sir John Jervis' work, giving the Acts of 1887 and 1892, with forms and precedents. This is, of course, the standard work on "Crown quest" law, and those who have need of information on this subject will doubtless supply themselves with it.

The Law of Bankruptcy in the United States under the National Bankruptcy Act of 1898, by WM. MILLER COLLIER; Albany, N.Y., Matthew Bender.

We recently referred to the fact of a new bankruptcy law having come into force in the United States. The work before us will be of interest in view

of possible Dominion legislation on a similar subject. It is a treatise on the principles and practice of the law of bankruptcy, as embodied in the recent Act, with the citations of cases decided under the former United States Acts, as well as many English decisions, and extended notes and comments upon the new statutory provisions. The book is intended for American readers but will be useful here also, should there be insolvency legislation in this country, and especially so in view of the similar trade conditions of the two countries, and of the probable similarity of many of the provisions.

Flotsam and Jetsam.

In an English County Court it has been held that the presence of disorderly co-tenants in a flat is not a valid excuse for the non-payment of rent.

An excellent joke reaches us from a barrister's chambers. A somewhat bumptious pupil, of critical habits, had a point put to him by his coach. Putting his head on one side he replied, "Pup. will consider." "Why don't you put it in the right form," said the coach, "and say Cur. adv. vult.?"—*Ex.*

A correspondent of the Daily Telegraph writes: "Some of your readers may not be aware why the amusing collections of anecdotes you are publishing are called 'bulls.' It appears that the first man to perpetrate them was one Obadiah Bull, an Irish lawyer, who came to London and flourished in the reign of Henry VII. He had a strong brogue, and his entertaining blunders were circulated as another Irish Bull."

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1898.

TUESDAY, Sept. 13.

Present: The Treasurer and Messrs. Barwick, Bayly, Bruce, Edwards, Idington, Lash, Osler, Ritchie, Shepley, Strathy, Teetzel and Wilkes.

Mr. Shepley, from the Legal Education Committee, laid on the table the Schedule of the Supplemental Examinations to be held during the present term.

Mr. Shepley, from the same Committee, presented their reports upon applications for special relief. Ordered that Mr. D. S. Bowlby's notice for call do remain posted until the last meeting of Convocation this term, and that he then be called if no objection appear. Ordered that the notice for call given by Mr. S. A. Hutchison do remain posted until 23rd September, and that if no objection appear, he be then called to the Bar, that upon completing proof of service under articles up to 2nd October, 1898, and his papers being in other respects correct and regular, he do then receive his certificate of fitness. Ordered that Mr. C. E. Hollinrake and Mr. J. R. Graham be called to the Bar and receive certificates of fitness.

Mr. Shepley, from the same committee, further reported upon the results of the Third Year examination, Easter, 1898. Ordered that the following gentlemen be called to the Bar :—Messrs. A. R. Hassard, F. E. Perrin, O. E. Culbert, G. H. Draper, H. G. Kingstone, W. S. Davidson, H. H. Shaver, R. R. Griffin, J. L. Paterson, D. S. Storey, D. M. Stewart ; and these gentlemen were with Messrs. C. E. Hollinrake and J. H. Graham introduced and called, also Mr. E. H. McLean, who had been ordered for call last term. Ordered that the following do receive their certificates of fitness :—The same gentlemen, with the addition of Mr. D. S. Bowlby, and with the exception of Mr. Shaver, who does not complete until next term.

Mr. Shepley, from the same committee, reported in respect of the special petition of Miss Eva Maude Powley :—This lady passed her first Intermediate Examination in Easter, 1897, not being bound by the Rules to attend the Law School up to the present time. In regular course, she should commence her attendance at the school at the approaching term. She presents a special petition asking that such attendance be altogether dispensed with. The Committee is of opinion that no special grounds for the petition are made out, and recommend that the petition be not granted. The report was adopted, and it was ordered accordingly.

The letter of Mr. H. H. Dewart, president of the Osgoode Amateur Athletic Association, asking for a grant of $150 towards the purposes of the Association, was read. Ordered that the request be not granted.

The complaint of Mr. S. M Barnes, Police Magistrate, of Smith's Falls, as to the conduct of Mr. A. B., accompanied by the declaration of one Easton was read. Ordered that the same be referred to the Discipline Committee for inquiry, whether a prima facie case be made out. Ordered that the complaint of Mr. J. McDonald against Mr. C. D., the consideration of which had been deferred until to-day, be taken into consideration to-morrow.

WEDNESDAY, Sept. 14th.

Present between 10 and 11 a.m., the Treasurer, and Messrs. Edwards, Hoskin and Shepley; and after 11 a.m., Messrs. Kerr, Osler and Ritchie.

Mr. Shepley, from the Legal Education Committee, presented a further report in respect of the Third Year examinations, Easter, 1898. Ordered that the following gentlemen be called to the Bar and receive their certificates of fitness :—L. F. Stephens, H. J. F. Sissons, J. D. McMurrich, W. Finlayson, and further that Mr. Stephens be called to the Bar with honours, and do receive a gold medal, and that Mr. Sissons be also called with honours. These gentlemen were subsequently introduced and called.

Dr. Hoskin, from the Discipline Committee, reported that a prima facie case had been shown in the matter of the complaint of Mr. S. M. Barnes against Mr. A. B., and of the complaint of W. S. Wilson against Messrs. E. F., G. H. and I. K., and that the matters should be investigated according to the Rules of the Society. Ordered accordingly.

The complaint of Mr. John McDonald against Mr. C. D. was further directed to stand until Friday, 23rd inst.

FRIDAY, Sept. 23rd.

Present : The Treasurer, and Messrs. Bayly, Clarke, Guthrie, O'Gara Ritchie and Watson.

Mr. Shepley, from the Legal Education Committee, presented the report of that Committee in respect of applications for special relief. Ordered that Mr. F. M. Devine be required to re-article himself for an additional period of twenty-two days. Ordered that Mr. T. J. Murray be required to re-article himself for an additional period, up to the first day of Michaelmas Term, 1898. Ordered that Mr. B. W. Thompson, who passed his Third Year Examination in Easter, 1898, be called to the Bar, and afterwards, upon furnishing

satisfactory proofs of his completion of service under articles, receive his certificate of fitness. Ordered that Mr. D. S. Bowlby, whose notice for call has remained posted, be called to the Bar. Ordered that Mr. S. A. Hutchison, who has produced satisfactory proofs of his attendance in chambers, be called to the Bar. Mr. Shepley presented a report from the same committee in respect of the Third Year Examinations, Easter, 1898. Ordered that the following gentlemen be called to the Bar :—S. S. Sharpe (with honours), and F. J. Maclennan, also that each do receive his certificate of fitness. Mr. Shepley presented a report from the same committee, in respect of the Third Year Supplemental Examination, Trinity Term, 1898. Ordered that the following gentlemen be called to the Bar :—W. D. Henry, J. D. Ferguson and N. Williams, and that the same gentlemen and Mr. J. C. L. White do receive their certificates of fitness. Ordered also that Mr. J. C. L. White, whose notice for call was late but has remained duly posted, be called to the Bar. Ordered also that Mr. G. H. Davy, who applied for leave to write at said Supplemental Examination, and has written and obtained sufficient marks, be allowed said examination.

Mr. Shepley presented a report from the same committee in respect to admissions of students-at-law in the ordinary course. Ordered that the following gentlemen be admitted as students-at-law of Trinity Term, 1898 :—J. P. Weeks. of the Graduate Class, and J. E. Farley, J. M. Jamieson, L. R. Knight, A. S. Bond, H. C. Gilleland, of the Matriculant Class.

Mr. Shepley also presented a report upon applications for special relief in respect to admission of students-at-law who have failed to give notice, at the proper time, for admission. Ordered that the following gentlemen be admitted as students-at-law as of Trinity Term, 1898 :—Messrs. Edward Gleason (Graduate), and E. Proulx (Matriculant), and that the notices given by Messrs. J. R. Howitt (Grad.); H. R. Frost, E. H. Parker, F. Symington and A. S. Williams (Matr.), do remain posted until the first day of Michaelmas Term, and that if no objection then appear they be admitted as of this Term. Ordered that Mr. W. B. Kingsmill, who presents a diploma of graduation from the Royal Military College at Kingston, be admitted as a student-at-law of the Graduate Class as of Trinity Term, 1898. In the matter of the application for admission of Mr. R H. McKay, Mr. Shepley, from the Legal Education Committee, reported that he had passed the Junior Leaving Examination in 1893, and had obtained the full standing of a Matriculant in July, 1894 ; that he is not within the Rule as to admission, and the Committee thinks that if the Rule is to be relaxed it should be upon some principle to be defined by Convocation. It was ordered that in the absence of special circumstances, as required by section 40 of the Law Society Act, Mr. McKay's applications cannot now be entertained, and that in the meantime it stand, in order to give him an opportunity to show special circumstances, if any such exist.

Mr. Shepley, from the Legal Education Committee, reported in respect to the petition of Mr. H. L. Boldrick. Ordered that Mr. Boldrick be allowed to exercise the option of dividing his Third Year lectures between the fourth and fifth years of his course.

It was ordered that the complaint of John McDonald against Mr. C. D.. barrister and solicitor, be referred to the Discipline Committee for investigation, and report. The following gentlemen were then introduced and called to the Bar :—S. A. Hutchison, B. W. Thompson, F. J. Maclennan, D. S. Bowlby, D. S. Storey, W. D. Henry, J. C. L. White, N. Williams, J. D. Ferguson.

The letter of Mr. W. S. Wilson, of 22nd September, 1898, to the Secretary, was read and referred to the Discipline Committee in connection with the complaint of Mr. Wilson, already referred to said Committee.

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We are glad to know that the views we ventured to express on the subject of judicial courtesy have been favorably commented upon, not merely by the Bar, but by members of the Bench. It would not, in this connection, be out of place, but simply and only to show the thought of those to whom our government might naturally look for guidance in such matters, to repeat the well known observation of one of England's greatest Chancellors, who is reported to have said, "My judges must be gentlemen, and if they know a little law, so much the better."

We follow the example of a contemporary in referring to what is described as a widespread belief still existing, that when a cheque is sent in settlement of a claim the creditor must return the cheque if he wishes to say that a sum larger than the amount of the cheque is due to him. Reference is made to the cases of *Miller* v. *Davies* and *Day* v. *McLea*, 58 L. J. Rep. Q.B. 293, 294; L.R. Q.B.D. 610, 612. In both these cases the defendant had sent to the plaintiff a cheque for a smaller amount than was claimed, stating that it was intended to be in settlement of the plaintiff's claim. The plaintiff replied that he accepted the cheque on account, and it was held that he was not precluded from suing for the balance of his claim, the keeping of the cheque not being, as a matter of law, conclusive that there was accord and satisfaction, but rather that it was a question of fact on what terms the cheque was kept.

Our namesake in England says that the accounts received from different parts of the country as to the working of the Criminal Evidence Act, which enables all persons charged

with indictable or other offences to be competent witnesses on their own behalf show that more than half of the accused persons elect to give evidence on their own behalf, and that often the husband or wife is also called. The result is that the sittings of the courts are protracted, and the pressure of work is largely increased in all criminal courts. Mr. Justice Hawkins has recently been discussing the Act at considerable length whilst addressing a grand jury. He thought it badly drawn, and difficult to construe, and was not in his opinion well considered, and he was not in love with it, and it would not tend on the whole to the beneficial administration of criminal justice. Another writer says that it will prove useful in securing for a guilty person his own just punishment by clearing up in the course of cross-examination any doubt which the evidence for the prosecution might have left in the minds of the jury. The manner in which it has been received in England does not induce us to alter the opinions which we have from time to time expressed in reference to the change which has been made in criminal evidence.

We are rather apt, and with some reason, to grumble at the amount of cases reported in the Dominion, and possibly it might be better to have fewer of them. However, this may be, we are very happily situated as compared with our legal brethren across the border. We issue in this country about fifteen volumes per annum. In the United States lawyers are supposed to be more or less familiar with the contents of about 110 large volumes. To keep track of all these cases would, of course, be simply impossible. Efforts are therefore made by various law book publishers to select the most important cases, and note authorities bearing thereon. As an example of this, we might refer to the Lawyer's Reports Annotated for October last. We see there a note by Mr. Labatt, articles from whose industrious and able pen have from time to time appeared in this journal. The principal case in that number is one reported of the Michigan Supreme Court, on the subject of knowledge as an element of an employer's liability to an

injured servant. To give some idea of the exhaustive nature of this note it may be said that it would make three hundred pages in an ordinary text book, and nearly a thousand cases from all States of the Union are consulted and referred to.

The present sittings of the Judicial Committee of the Privy Council is not presumably a convenient one for the Canadian profession. However that may be, the list of business just to hand shows that of the twenty-six Colonial and Indian appeals down for argument during November and December of this year, only one is from a Canadian court, viz., *C. P. R.* v. *Parke* from the Supreme Court of British Columbia. This case is an interesting one, involving the question whether the respondents can be restrained by injunction from continuing to irrigate on their ranch above the railway, thereby causing landslides, to the damage of the railway track. Both the trial judge and the full court on appeal were of opinion that the British Columbia statute authorizing the bringing of water on the land for irrigation purposes impliedly exempted the irrigator, in the absence of negligence, from all liability in respect of the escape of such water, however destructive such escape might be to neighbouring lands. (See *C.P.R.* v. *McBryan*, ante p. 282). Among the appeals set down for judgment are three from Canada, viz.: *G. T. R.* v. *Washington*, *Young* v. *Consumers Cordage Company*, and *Seminaire de Quebec* v. *Limoilu.*

Attention was recently called in these columns (ante, p. 449), to what appeared to the writer to be the objectionable and demoralizing practice of recklessly filing election petitions, and then going through the procedure of "sawing-off" one against another. Mr. Justice Osler took occasion, in the Haldimand case, on 17th ult., to criticize such proceedings with considerable severity. His remarks sound almost like an echo of the article referred to. In discussing the petition he alluded to the matter in words which are reported in the daily papers

as follows: "I feel certain that there has been something very disgraceful in the way of setting off one petition against another. I think the judges can only draw one conclusion from the way in which these cases are being disposed of. I tried a case in East Lambton, in which, after two days' contestation, two charges of paying for bringing in voters to the constituency were proved, but agency was not made out. The case was adjourned, and more witnesses were to be subpœnaed, and when the case came on the other day, before my brother Ferguson and myself, the petitioner said he did not propose to offer any more evidence, and respondent's counsel said he did not ask for costs, and he would have been entitled to costs if he had asked for them. What inference can be drawn from such a course as that? But the courts are powerless to do anything. They can only try a case when it is presented to them. They cannot act as commissioners and direct evidence to be sought for. But it is an unsatisfactory mode of disposing of cases. Some seventy petitions were filed, and some seventy persons swore that they believed the charges in these petitions were true, and the result is that only about ten petitions have been tried. But the courts can do nothing except register a disposition of the case as it comes before them."

SOME POINTS IN ASSESSMENT LAW.

The recent appeals from the Court of Revision in the City of Toronto have given rise to various matters of interest under the Assessment Act, to which it may be useful to refer. Some of the judgments we shall endeavour to report in full.

The most important, possibly, was a question as to whether trust funds, in the hands of the Accountant of the Supreme Court of Ontario, are assessable. The County Judge holds, and it seems to us very properly so, that these amounts are liable to assessment. The law should reach all property, whether it is in the hands of trustees or persons in their own right. These trust funds are not held by the Crown for the public benefit, but by the Accountant of the court for individual beneficiaries.

In another case a question arose as to whether the respondent was owner or tenant of certain premises. He claimed to be the owner under an alleged purchase, which, as the judge remarked, was adorned with numerous badges of insincerity and deception. No money was paid, and there was no registration of the deed and mortgage. There was in the mortgage a covenant to pay a certain sum in less than six months, which covenant was given by the alleged owner, who was shown to be insolvent, to the knowledge of the vendor, and the actual payment to be made under the mortgage during its currency, was the exact rental value of the property assessed; it also appeared that the alleged purchase was made to enable the respondent to qualify for municipal honours. The learned judge on the evidence held that the real transaction was a rental of the premises, and not a purchase, and that the so-called purchaser was not at the time of the assessment, or at the date of the appeal, the owner of the premises in question, but should be rated as tenant.

A contribution was made to the mountain of decisions on the subject of fixtures. There seems to be no possibility of arriving at any rule, or set of rules, to guide as to what articles are to be considered as fixtures. In this appeal it was held that the wires, switchboards and instruments of a telegraph company are assessable as real estate. The city was not successful, however, in sustaining the assessment of either the patent of the Luxfer Prism Co. or its supposed value.

The appeals also brought out various defects and oversights in the Assessment Act. We can only at present refer to a few of the many which need careful attention at the hands of the legislature. The present practice as to appeals from the Court of Revision is cumbersome and expensive. An appellant who desires to be in a position to obtain the opinion of the Court of Appeal can only do so as a matter of right by first demanding an appeal to a Board consisting of three county judges, who must first hear and decide the case. An appeal to a single judge gives no such right. This procedure entails considerable expense, and is of no value whatever, if it is the desire to have a final decision from the Court

of Appeal. The simple remedy would be in all cases of large amounts to allow an appeal as a matter of right from the county judge sitting alone, leaving appellants the right, should they so desire and are willing to pay the expense, to have their cases heard before three county judges as at present.

Another point here arises. The provision as to costs is most incomplete, and often bears very hardly upon appellants. Under the Act the only costs that can be imposed are fees to witnesses on the Division Court scale, and the costs of obtaining the attendance of such witnesses, and, in case of an appeal to three judges the court can only deal (at least it has been so held by the judges of York, Ontario and Peel) with an apportionment of the five dollar per diem allowance to the two judges called in from adjoining counties. This is of no substantial benefit to a successful litigant. Energetic officials, desirous of increasing the revenue of the corporation, or of obtaining kudos for their supposed diligence, recklessly assess everything in sight, regardless of their true value, or whether they are assessable or not. Parties, therefore, have to appeal, and often have to go to a large expense in the employment of experts to prove values. If successful they should not have to bear this expense. The offending assessor can theoretically be brought within the criminal provision of the Act as to fraudulent assessments. But here again the merciful interpretation of the courts requires that the assessment should not only be fraudulent, by reason of its being thirty per cent. above the true value, but also that it should be shown to be wilfully fraudulent, thus rendering this provision of the statute practically inoperative. It would, we think, be a very proper amendment to the Act to declare that it means what it says, or in other words to enact that it is not necessary for the proof of a fraudulent assessment within the meaning of the section to show that it was wilfully, intentionally, or maliciously so.

CANADIAN FISHERIES APPEAL.

A REPLY AND REJOINDER.

I would like to make my reply to Mr. C. B. Labatt's article in a recent number of this journal (ante, p. 677), wherein he criticises some comments of mine in the current number of the Law Quarterly Review upon the judgment of the Privy Council in the Fisheries Case.

Mr. Labatt is evidently of opinion, first, that I do not understand Lord Herschel; and secondly, that Lord Herschel does not understand English.

In that appeal the Privy Council were asked among other questions, whether the Dominion Parliament had jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in waters, the beds of which were Provincial property at the time of the passing of the British North America Act, or had been granted to private individuals before that event. These questions obviously relate to legislative jurisdiction over proprietary rights in relation to fishing in the strict and ordinary sense of those words; and the Privy Council so treated them. The part of the judgment with which we are now concerned clearly recognizes this, and is as follows:

"Their lordships pass now to the questions relating to fisheries and fishing rights. Their lordships are of opinion that the ninety-first section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading of 'Sea, coast and inland fisheries' in section ninety-one. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the Provinces respectively, remained untouched by that enactment. Whatever grants might previously be lawfully made by the Provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be

remembered that the power to legislate in relation to fisheries, does necessarily to some extent enable the legislature so empowered to affect proprietary rights."

Thus the Privy Council in the clearest possible way show that they are drawing a distinction between legislative power and proprietary rights; and they then give utterance to the proposition which was the fons et origo of my article, namely: "If the Legislature purports to confer upon others proprietary rights where it possess none itself, that, in their lordships' opinion, is not an exercise of the legislative jurisdiction conferred by section ninety-one. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the Provinces, and not vested in it." And so the judgment concludes: "It follows from what has been said that in so far as s. 4 Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the Provinces, it would not be in the jurisdiction of the Dominion Parliament to pass it."

This judgment was delivered by Lord Herschel, and Mr. Labatt has come to the conclusion, to use his own words, "That that eminent jurist has inadvertently fallen into a verbal blunder, and that the control to which he was referring was rather that which finds its active exercise in laws declaring to whom proprietary rights shall belong than that which amounts to 'possession' (properly so-called)."

So what Lord Herschel ought to have said in the sentence which has given rise to this discussion was, apparently, "If the legislature purports to make laws declaring to whom proprietary rights shall belong where it has no power to make such laws, that in their lordships' opinion, is not an exercise of the legislative jurisdiction conferred on the legislature by section ninety-one."

Mr. Labatt, however, gives Lord Herschel an alternative mode in which he might have expressed himself without falling into any verbal blunder. Mr. Labatt says: "The real meaning of Lord Herschel's words I believe to be merely

this—that the inference of an excess of power by the Dominion Parliament in the given case necessarily follows from the fact that it was undertaking to confer proprietary rights in regard to a subject matter which the British North America Act did not authorize it to control to this extent."

If Lord Herschel, then, had had the advantage of discussing the matter with Mr. Labatt, he might have expressed his meaning thus:—"If the legislature purports to confer proprietary rights in regard to a subject matter over which the British North America Act did not authorize it to confer proprietary rights, that in their lordships' opinion is not an exercise of the legislative jurisdiction conferred upon it by the British North America Act."

Now I think we generally expect and find in the judgments of the Privy Council propositions of more value than such as Mr. Labatt suggests, namely, that if the Dominion Parliament purports to exercise legislative power which it does not posess, it exceeds its legislative jurisdiction.

I am afraid I cannot accept Mr. Labatt's corrections, or retire from the Fashoda which I occupy. The fact is, I think, there were two ways in which the question of legislative jurisdiction submitted as above stated in the Fisheries case might have been dealt with. One was by founding the judgment strictly on the construction of the legislative power conferred in item 12 of section 91, whereby the Dominion Parliament is given power to make laws for the peace, order and good government of Canada in relation to sea, coast and inland fisheries, and holding that, on the proper construction of this item, it does or does not comprehend legislative power over proprietary rights in relation to sea, coast and inland fisheries. This was the way in which the Supreme Court of Canada dealt with the matter, though they founded their decision upon what I have ventured to submit, is a somewhat peculiar analogy between the construction of an ordinary legislative enactment and the construction of a legislative power conferred by the British North America Act. But this mode of dealing with the matter, at all events, gives rise to no constitutional difficulty.

The Privy Council follows another, or what seems to me the other, way of dealing with the matter. They do not say that on the construction of the words conferring that particular legislative power over sea, coast and inland fisheries, jurisdiction over proprietary rights in relation to fisheries is not included, but they bring to bear on the matter what may be called an extraneous principle applicable to Dominion legislative power generally, and not merely to the construction of the particular words conferring the particular legislative power over fisheries. They hold, through the mouth of Lord Herschel, that in conferring legislative jurisdiction upon the Dominion Parliament, the British North America Act did not confer upon it any power, in any case, to confer upon others proprietary rights which it does not itself possess.

No doubt to talk of a legislature possessing proprietary rights is something novel and unusual, and I think, as I have stated in my article in the Law Quarterly Review, that if a British legislature can be said to possess any property at all, it can only be such property as is vested in the Crown as a constituent part of the legislature, although no doubt a legislature might do the extraordinary thing of creating itself a corporate body competent to possess property as such. But I am not aware that any legislature has ever done so. In spite of Mr. Labatt's remarks I think that what Lord Herschel says is quite clear, and I have no doubt he meant what he said, but if so, I still think that a limitation has been expressed with regard to the legislative power of the Dominion Parliament, which has not heretofore ever been expressed with regard to the power of any colonial legislature, and which must apply as much to the Provincial legislatures and to the legislatures of all self-governing colonies, as it does to the Dominion Parliament. If I am right in this I certainly cannot see how this is consistent with the view hitherto entertained as to the plenary character of colonial legislative power, throughout the British empire.

The sequence of thought in the Privy Council judgment, *pace* Mr. Labatt, is clear enough. There is a distinction

between conferring proprietary rights and conferring legislative jurisdiction. Section 91 of the British North America Act confers the latter not the former; nor are proprietary rights in relation to fisheries conferred on the Dominion by other parts of that Act. Therefore, in legislating in relation to sea coast and inland fisheries under section 91, the Dominion Parliament could not confer upon others proprietary rights in relation to fisheries, neither it nor the Crown as represented by the Dominion Government being vested with such proprietary rights. It is the supposed sequitur which I contend is novel and surprising.

In regard to Mr. Labatt's comments in respect to the case of *Dobie* v. *The Temporalities Board*, to which I referred in my article in the Law Quarterly Review, I think I need only point out that the Privy Council are not there referring at all to proprietary rights created by the Province of Ontario being legislated upon by the Legislature of Quebec. What they speak of there is legislative power over funds of a corporation belonging to Ontario which are situate or vested in Quebec. But the creation of a corporation does not, so far as I am aware, necessarily involve any proprietary rights at all, though it may involve the creation of an entity capable of becoming vested with proprietary rights.

I may perhaps, be allowed to add that it does appear to me that it would be quite possible to hold that though the Dominion Parliament could not transfer to itself property which has by the British North America Act been left to the Province and not vested in it, yet, that in exercising its legislative powers under section ninety-one, it might incidentally affect even Provincial property, where to do this is necessary to the full and effectual exercise of such legislative powers.

With regard to the concluding part of Mr. Labatt's article I will only observe that the doctrine of inherent law-making powers does not on the authorities apply to our constitution. Nothing seems better established on the highest authority, than that both Dominion Parliament and Provincial Legislatures have only such legislative powers as are con-

ferred upon them by the British North America Act. When my friend, Mr. Labatt, disparages my "bolt out of the blue" by calling it a mere "brutum fulmen," I can only say "Et tu quoque, Brute!"

A. H. F. LEFROY.

It is convenient that the above reply to Mr. Labatt's article and the rejoinder of the latter should appear together. The duel between these doughty champions is an interesting one, but press of other matter will prevent its further continuance. The rejoinder is as follows:

The editor of the CANADA LAW JOURNAL considers that the maxim, *Interest reipublicæ, ut sit finis litium*, is applicable to the discussion between Mr. Lefroy and myself, but has kindly shown me the manuscript of the above article, and given me permission to say something by way of rejoinder, on condition that I confine my remarks within a reasonably narrow compass.

I am not at all disposed to complain of the limitations of space thus imposed upon me, for my critic has, in my humble judgment, wholly failed to meet the main contention put forward by me, viz., that it is a solecism to predicate "possession" of that species of dominion or control which a legislature normally exercises over proprietary rights, whether these rights are vested in the Crown or in private persons, and that, supposing my views upon this point to be correct, Lord Herschel's use of the word in such a connection could not justifiably be made the basis of an argument that the Privy Council intended to enunciate a principle limiting, in this particular direction, the effect of its earlier rulings as to the plenary powers of the Canadian legislatures. In the lowly spirit which was befitting I requested Mr. Lefroy to sustain his theory by producing from the treasure-house of his constitutional lore, some authoritative precedent for the terminology to which I excepted, and the only answer I have received to my petition is some good-natured persiflage about my audacity in venturing to suggest that Lord Herschel does not understand English. I

asked for the bread of instruction, and my "guide, philosopher and friend," has given me the stone of reproof. Unless I am much mistaken, however, the readers of our respective articles will scarcely regard this as a satisfactory way of settling the matter. Immunity from criticism is a privilege to which Lord Herschel has no special claim. Besides this, not a few persons, I fancy, will be inclined to think that there is a certain inconsistency in the attitude of a disputant who, as will be seen from his article, admits that the phraseology under discussion is "novel and unusual," and at the same time can find nothing but what is ludicrously irreverent in my refusal to accept his conclusions, until he has furnished me with some other instance of a similar use of the word "possess." One who shelters himself behind the dogma of judicial infallibility places himself in a rather awkward dilemma by virtually confessing that his own faith is not sufficiently robust to preserve him from some qualms of doubt as to the correctness of the ex cathedra utterances to which we are invited to listen with unquestioning veneration.

The manner in which Mr. Lefroy has dealt with my linguistic criticism renders it unnecessary for me to examine in detail the remainder of his article, even if the editor were willing to allow me the necessary space for that purpose. Until it is determined whether Lord Herschel's words are to be taken literally, or, as I ventured to suggest, he has inadvertently been guilty of a solecism, it is not worth while to pursue the secondary inquiry whether his words really contain the germ of a doctrine which would revolutionize the constitutional law of Canada in some very important respects. But I dare say I shall not be regarded as taking an unwarrantable advantage of the editor's license if I point out that my theory that Lord Herschel does not really mean to make the possession or non-possession of proprietary rights by a legislature itself the test of its capacity or non-capacity to confer such rights upon others is strongly supported by some language which he uses elsewhere. The inference that in the sentence which is the bone of contention between

Mr. Lefroy and myself, his Lordship was merely employing a rather loose metonymy in which the legislature is treated as identical with the political entity which it represents seems to me quite inevitable when I read the following passage taken from the second paragraph of the judgment (the italics are mine):

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect to a particular subject matter *is conferred on the Dominion legislature*, for example, affords no evidence that any proprietary rights *were transferred to the Dominion*. There is no presumption that, because legislative jurisdiction *was vested in the Dominion Parliament*, proprietary rights *were transferred to it*."

The confusion between the Dominion and its Parliament here becomes quite obvious, owing to the juxta-position of the two sentences in which it occurs. But that the sentence discussed in Mr. Lefroy's article presents another example of the same verbal laxity, is, to my mind, almost too clear for argument when I find in an earlier part of the same paragraph the statement that "their lordships were of the opinion that the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries." The only difference between the two cases is that in the latter the error is somewhat less patent, owing to the fact that the correct and incorrect expressions are separated by several sentences.

The objections to the explanation thus offered for the purpose of bringing Lord Herschel's remark into harmony with the normal conceptions and terminology of constitutional jurisprudence, as well as with the earlier rulings of the Privy Council itself, seem to be quite imponderable. There is nothing at all startling in the assumption that a judge, however eminent, may sometimes, to borrow a phrase from Mr. Silas Wegg, "decline and fall" into language which does not satisfy the stricter standards of technical accuracy. *Aliquando bonus dormitat Homerus.* To most lawyers, I think, the supposition of a momentary lapse of this character will appear infinitely preferable to the alternative theory that, in this single sentence, the judgment breaks away from the conception which dominates it, viz., that the extent of the power of

the Dominion Parliament to legislate in regard to fisheries, depended simply upon whether the British North America Act had transferred to the Dominion any proprietary rights in the waters which were the physical, tangible subject-matter of the fisheries. Neither the counsel for the Dominion and the Province, nor the Board itself, thought it worth while to deal with the case as if it were one in which the familiar rule of construction, that a grant of an express power carries with it all incidental powers which may be necessary to give it due effect, might possibly be applied so as to vest in the Dominion Parliament the capacity of creating or otherwise controlling such rights. The sole question handled was whether the Dominion Parliament had obtained legislative jurisdiction over certain proprietary rights as the result of a conveyance of such rights to the political entity of which that Parliament is the law-making agent. Such a question being extremely simple in its essence, it is neither extraordinary nor unnatural that a judge, in undertaking to expand the answer to it beyond a mere yes or no, should be led into language savouring more or less strongly of platitude. I own, therefore, that I am not very seriously staggered by the adroitness with which Mr. Lefroy, by paraphrasing my own paraphrase of the sentence under discussion, has tried to put me in the predicament of making Lord Herschel enunciate a jejune commonplace quite beneath the dignity of the Privy Council. Even those who might be prepared to allow some weight to this consideration, if it stood by itself, will, I imagine, agree with me that its importance fades away towards the vanishing point, when we advert to the alarming consequences which would follow, if we should regard his Lordship, not as the author of a mere platitude, but as the propounder of a doctrine which would completely overthrow the accepted theories as to the functions and distinctive characteristics of a constitutional legislature. Only the very clearest expression of opinion on the part of the Privy Council will suffice to convince Canadian lawyers that a body whose history, to say nothing of its very official style and title of "High Court of Parliament," exhibits it as a mere jurisdictional assemblage, regulating the investiture and divestiture of proprietary rights, and not as an entity posses-

sing those rights antecedently to the enactment of the statutes which determine their disposition, intended by the British North America Act to create other law-making bodies fashioned in that novel mould which, if we are to accept Mr. Lefroy's views, is suggested by Lord Herschel's words.

My explanation of the relation of the judgment in *Dobie* v. *Temporalities Board* to the doctrine which I put forward as to the real scope and limits of the so-called plenary powers of Canadian legislatures is impugned on the ground that "the creation of a corporation does not necessarily involve any proprietary rights," but "merely the creation of an entity capable of becoming vested with proprietary rights." I am afraid that, until Mr. Lefroy favours me with some explicit authorities, I must decline to accept his theory that a corporate franchise is not a right of property. Such a privilege may in many cases be of small, and even merely nominal value, but, I should apprehend that, in the eye of the law, its value always remains an appreciable quantity.

Mr. Lefroy also thinks that, as "the doctrine of inherent lawmaking powers does not, on the authorities, apply to our constitution," my argument based on the presumed right of Canadian legislatures to exercise the right of eminent domain necessarily falls to the ground. Here again, I must decline to evacuate my position until I am referred to some judicial utterance going to prove that this general principle as to the non-existence of inherent powers extends to a sovereign power like that of eminent domain. And even if I am mistaken on this point, it is quite easy to reach by another road which avoids this difficulty the conclusion which my remarks on Mr. Lefroy's observations regarding the Expropriation Acts were intended to establish. If a legislature has the capacity to authorize the building of a railway, it must have the capacity to invest its grantees with such powers as are reasonably necessary to carry out the work, and one of those powers must clearly be that of compelling individuals to part with their property. Divorced from and unaided by such a power, a grant of a franchise for execution of an extensive public work would be, in almost any conceivable case, a mere barren formality.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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MORTGAGE—COLLATERAL ADVANTAGE—REDEMPTION BEFORE DAY FIXED FOR PAYMENT.

In *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307, the plaintiff was a mortgagee of an hotel and the defendants were the mortgagors. The mortgage contained a covenant by the mortgagors that, during the continuance of the mortgage, they would buy liquor exclusively of the plaintiff for sale on the mortgaged premises. The defendants having ceased to observe this covenant, the action was brought for an injunction to restrain the breach of the covenant. The defendants contended that the covenant could not be enforced as being a stipulation for a collateral advantage beyond the repayment of the mortgage debt and interest, and they also, by cross action, claimed the right to redeem the mortgage, although the day fixed for payment had not arrived. The mortgage contained a proviso that notwithstanding the proviso for redemption, the mortgagors should not be entitled to require or compel the mortgagee to receive his principal until the expiration of five years. Romer, J., held that the plaintiff could not be compelled to accept this mortgage money before the time fixed for payment. In Ontario, of course, the statutory provision (R.S.C. c. 127, s. 7) entitling a mortgagor to redeem after the expiration of five years, would override any such stipulation in the mortgage, for payment at a later period. He was therefore of opinion that the defendants' claim to redeem was premature. He was also of opinion that the covenant to buy liquors from the plaintiff was valid and binding, and should be enforced, and he granted the injunction, and his judgment on both points was sustained by the Court of Appeal, (Smith, Rigby and Williams, L.JJ.). The Court of Appeal points out that the statement of the law in *Jennings* v. *Ward*, 2 Vern 520, is too broad, and that it is not correct to say that every collateral advantage bargained for by a

mortgagee, over and above the repayment of his principal and interest, is void in equity, but, that on the contrary, it is only such collateral agreements as have the effect of unduly clogging the right to redeem, and that as neither the stipulation for the continuance of the loan for a specified period of five years, nor the covenant for the purchase of liquor from the plaintiff, were open to objection as clogging the right of redemption, they were valid and binding on the mortgagors.

DECLARATORY JUDGMENT — INJUNCTION TO RESTRAIN PROCEEDINGS BEFORE JUSTICE UNDER A STATUTE.

In *Grand Junction Waterworks Co.* v. *Hampton* (1898) 2 Ch. 331, the plaintiffs were proposing to erect an engine house, and the defendants, a municipal corporation, objected to the proposed erection as being a breach of a statute, owing to the building extending beyond the general alignment of the street on which it was erected; and they commenced proceedings before justices, and the plaintiffs were found guilty, and were fined; the plaintiffs thereupon applied to the justices to state a case with a view to taking the matter before a Divisional Court. The plaintiffs had previously commenced the present action, claiming a declaration of their right to erect the building in question. The defendants submitted as a question of law that under the circumstances the action could not be maintained, and the case came on for hearing on this point. Stirling. J., after a careful review of the authorities come to the conclusion that even if the court had jurisdiction to grant an injunction to restrain proceedings before justices, it ought to be exercised with the greatest possible caution; and where the legislature has pointed out a mode of proceeding before a magistrate it is not open, as a general rule, for another court to stop that proceeding by injunction, and in contests between local authorities and private owners, he was of opinion that that rule ought to be adheredto somewhat strictly; and in view of the circumstances of this case it was one in which the court ought not to interfere by injunction, or by making any declaration of right, but ought to leave the matter to be disposed of by the tribunal pointed out by the statute, and the action was dismissed with costs.

MORTGAGE—EQUITABLE DERIVATIVE MORTGAGE BY DEPOSIT—NOTICE—PRIORITY.

Hopkins v. *Hemsworth*, (1898) 2 Ch. 347, was a case in which a conflict arose between two derivative mortgagees, under the following circumstances. Hill being a mortgagee by deposit of certain title deeds of land, on Dec. 7, 1875, made a derivative mortgage by depositing the same deeds with Mrs. Walker. Hill subsequently fraudulently got possession of the deeds, and on Sept. 24, 1892, deposited them by way of equitable mortgage with the defendant Hemsworth. On March 20, 1895, Hemsworth gave notice of his claim as mortgagee to the original mortgagor. No notice was ever given of Mrs. Walker's mortgage, and the simple question was whether Hemsworth had by virtue of the notice given to the mortgagor, acquired priority over the Walker mortgage. Kekewich, J., answered this question in the negative, being of the opinion that the effect of the mortgage was to create an equitable estate in land, and that, as to equitable estates, the doctrine of obtaining priority by notice did not prevail.

WILL—CONSTRUCTION—HOTCHPOT CLAUSE.

Wheeler v. *Humphreys*, (1898) A.C. 506, is a case arising upon the construction of a hotchpot clause in a will. In the court below the case was known as *In re Cosier*, *Humphreys* v. *Gadsden*, (1897) 1 Ch. 325 (noted, ante, vol. 33, p. 425), and the decision there reported is affirmed by the House of Lords, (The Lord Chancellor and Lords Macnaghten, Morris and James), but they reach their conclusion by a different process of reasoning to that adopted by the Court of Appeal. The facts may be stated briefly thus: A testator had in his lifetime entered into a covenant to pay to the trustees of his son's marriage settlement, £10,000 six months after the testator's death, to be held in trust for the husband and wife for their respective lives, and then for the issue of the marriage, and in default of issue, in trust for the testator. By his will he provided that all sums which he had covenanted to give to or with any child on his or her marriage should, in default of any direction to the contrary, be taken in or towards satisfaction of his or her share, and should be brought into hotchpot

and accounted for accordingly; and he gave his residuary estate equally between his son and his daughter. On the testator's death, his executors paid the trustees of his son's settlement £10,000, and gave a like sum to the daughter, and then divided the residue equally between them. The son having died without issue, the present action was brought by the daughter claiming to be entitled to one-half of the £10,000 given to the trustees of the son's settlement, in respect of the testator's contingent interest therein, which she claimed formed part of his residuary estate. The House of Lords come to the conclusion that the effect of the will was to give to the son absolutely the contingent interest of the testator in the £10,000, covenanted to be paid to his trustees, because, as Lord Macnaghten points out, to hold otherwise would be to require the son to give credit for something which never was his, and then treat that something as belonging absolutely to the testator. The contingent interest was not given to the son in the testator's lifetime, and therefore did not come under the hotchpot clause. Viewing the will in this light, the conclusion was, of course, inevitable that the contingent interest in the £10,000 was really no part of the share given to the son, for which he had to account, and the daughter's claim to a moiety of the £10,000 was accordingly rejected.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT "WHICH ACCORDING TO THE TERMS THEREOF OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—ORD. XI., R. 1 (E)—(ONT. RULE 162 (E).)

In *Comber* v. *Leyland* (1898) A.C. 524, the House of Lords (the Lord Chancellor and Lords Herschell, Macnaghten, Morris and Shand) have given a judicial construction to Ord. xi., r. 1 (e) (see Ont. Rule 162, c), which provides for service of a writ out of the jurisdiction, in an action founded on a contract "which according to the terms thereof ought to be performed within the jurisdiction." Their Lordships hold in effect that the word "ought" in this rule means "must," and if the contract be one which according to its terms may be performed within or without the jurisdiction, the Rule does not apply, and leave to serve the writ out of the jurisdiction

cannot be given. The Ont. Rule 162 (e) is rather more explicit than the English Rule, the words used being "a contract wherever made, which is to be performed within Ontario."

TRADE MARK—INVENTED WORD—COSTS.

In *The Eastman Photographic Co.* v. *The Comptroller of Patents* (1898) A.C. 571, the House of Lords discuss the subject of invented words as trade marks, and come to the conclusion that the word "Solio" as applied to photographic paper comes under the head of an invented word, and as such is registrable as a trade mark. The Comptroller-General of Patents had been upheld by the court below in his refusal to register it, and had been awarded costs; the successful appellant now claimed costs against him, but their Lordships held that there was no power to order the Crown to pay costs, but directed the costs paid under the order of the court below to be refunded.

NULLUM TEMPUS ACT—9 GEO. III., C. 16.

In *Attorney-General* v. *Love* (1898) A. C. 679, the Judicial Committee of the Privy Council (the Lord Chancellor, Lords Macnaghten, Morris and Mr. Way) hold that under a statute of New South Wales, providing that all laws and statutes in force within the realm of England at the passing of this Act (i.e., in the year 1828) "shall be applied in the administration of justice in New South Wales," the Nullum Tempus Act, 9 Geo. III., c. 16, was introduced as part of the law of that colony. A similar conclusion was reached in *The Queen* v. *McCormick*, 18 U. C. Q. B. 131.

BANKER—CUSTOMER—ACCOUNT NOT EAR-MARKED AS TRUST ACCOUNT—SET OFF.

Union Bank of Australia v. *Murray-Aynsley* (1898) A.C. 693, was a New Zealand appeal. The point involved was simple, but one of some importance. A trustee had paid trust funds into his private account with a bank; the account was not in any way known to the bank as a trust account, nor did the bank receive the money in question knowing it to be trust money. The customer having become bankrupt, and

being indebted to the bank, the latter claimed to set off the amount standing to his credit against his indebtedness; the action being brought by the trustees of the moneys in question to compel payment thereof by the bank, the courts of New Zealand gave judgment in favour of the plaintiffs; the Judicial Committee of the Privy Council, (Lords Watson, Hobhouse and Davey, and Sir R. Couch) however, reversed this decision, and dismissed the action, being of opinion that the evidence failed to show that the bank had any notice of the trust character of the funds. This is an instance of a successful appeal on a question of fact. The judge of first instance, while professing to give credit to the bank manager for "perfect honesty in his evidence," nevertheless, instead of accepting it according to its plain meaning, adopted what Lord Watson characterizes as "the dangerous course" of first assuming that his statement was an imperfect representation of his conversation with the trustee when the account was opened, and then building upon that assumption a series of speculations and conjectures, arising not out of, but outside, the evidence resulting in the conclusion of fact, that "the manager must have known, or have had strong reason to believe that the moneys referred to were not the moneys of the firm." And the Colonial Court of Appeal were thought also to have failed to appreciate the broad distinction between the relation of an agent to his principals, and his relation to his own bankers.

The first election of benchers of the North-West Territories Law Society has just taken place. We are glad to see that an excellent selection has been made, and the names are a guarantee that the society will be well managed. They are as follows: East Assiniboia, E. L. Elwood, Moosomin; West Assiniboia, W. C. Hamilton, Q.C., and Norman McKenzie, Regina; North Alberta, N. D. Beck, Edmonton; South Alberta, C. C. McCaul, Q.C., J. A. Lougheed, Q.C., and Peter McCarthy, Q.C., Calgary; and C. F. Conybeare, Q.C., Lethbridge; Saskatchewan, James McKay, Q.C., Prince Albert.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Man.] NORTH-WEST ELECTRIC CO. *v.* WALSH. [Oct. 13.

Company—Directors—By-law— Ultra vires — Discount shares — Calls for unpaid balances—Contributories—Trustees—Powers—Contract—Fraud—Breach of trust—Statute, construction of—C.S.M., c. 9—R.S.M., c. 25, ss. 30, 33.

The directors of a joint stock company incorporated in Manitoba have no power under the provisions of "The Manitoba Joint Stock Companies Incorporation Act" to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company, is invalid.

A by-law or resolution of the directors of a joint stock company, which operates unequally towards the interests of any class of the shareholders is invalid and ultra vires of the company's powers.

Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.

Judgment of the Court of Queen's Bench for Manitoba (11 Man. L.R. 629), reversed, TASCHEREAU, J., dissenting. Appeal allowed with costs.

Ewart, Q.C., for appellants. *J. S. Tupper*, Q.C., for respondent.

N.W.T.] AMES HOLDEN CO. *v.* HATFIELD. [Oct. 24.

Contract—Construction—Ownership of goods—Debtor and creditor—Interpleader.

W., a merchant, owing money to H., who was pressing for a settlement, an agreement was entered into as follows: (1) The said G. W. West and Mary Jane, his wife, will during the continuance of these presents provide and furnish free of rent and taxes a store at Innisfail aforesaid, suitable for carrying on the business of a general merchant. (2) The said Thomas A. Hatfield will supply to the said G. W. West and Mary Jane, his wife, at Innisfail aforesaid, all such goods and stock in trade as are usually necessary and required in the trade or business of a general merchant, and replenish such stock in trade from time to time as occasion may require and the said Thomas A. Hatfield deem expedient. (3) The said G. W. West shall, except when prevented by sickness, devote the whole of his time and attention to carrying on the trade or business of a general merchant at Innisfail aforesaid, and diligently employ himself therein, and promote to the utmost of his powers the benefit and advantage of the same. (4) The said G. W. West and Mary Jane, his wife, shall make a report to the said Thomas A. Hatfield of the sales made and the

cash balances once in each and every month during the continuance of this agreement and shall render unto the said Thomas A. Hatfield a general account of the stock in trade, credits, property and effects, debts and liabilities of the said business once every three months. (5) The said G. W. West and Mary Jane, his wife, shall remit to the said Thomas A Hatfield, at Calgary, all the moneys received by them from sales in the course of the business as aforesaid, such remittances to be made on Tuesday and Friday in each and every week, deducting freight charges and such amounts as may have been paid out in cash for local merchandise and farm produce. (6) The said Thomas A. Hatfield may from time to time, and at all times, visit the said store at Innisfail, and examine all and any of the books of account kept by the said G. W. West and Mary Jane, his wife, and take an account of the stock in trade, credits, property and effects, debts and liabilities of the business, and the said G. W. West and Mary Jane, his wife, shall whenever called upon, give to the said Thomas A. Hatfield full explanations with regard to any matters concerning the said business as aforesaid. (7) Proper books of account shall be kept by the said G. W. West and Mary Jane, his wife, and entries immediately made therein of all receipts and payments made, and of all other matters and things as are usually entered in similar books of account. (8) The net profits of the said business, after deducting all freight charges shall be shared in equal proportions between the said Thomas A. Hatfield and G. W. West. (9) This agreement may be determined at any time by Thomas A. Hatfield. (10) If the said G. W. West and Mary Jane, his wife, wish to terminate this agreement they shall give to the said Thomas A. Hatfield one month's written notice of their desire so to do. The goods supplied by H. under this agreement having been seized under execution against W. an interpleader order was issued to try out the title thereto.

Held, that under the agreement the goods supplied by H. were not sold to W., but H. retained such an interest in them as to prevent them being liable for W 's debts. Appeal dismissed with costs.

Latchford and *McDougall*, for appellants. *Knott*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] [June 18.

IN RE JENISON AND KAKABEKA FALLS L. & E. COMPANY.

Arbitration and award—Arbitrator—Refusal to state case.

When questions of law arise in the course of arbitration proceedings, any party thereto may apply to the arbitrator to state a case for the opinion of the Court, and in the event of his refusal may apply to the Court to compel him to do so. The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.

On the merits the judgment of ROBERTSON, J. refusing to order the arbitrator to state a case was affirmed.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for appellants. *Johnston*, Q.C., for respondents.

From Armour, C.J.] COUNTY OF SIMCOE *v.* BURTON. [Oct. 4.

Principal and surety—Bond—Municipal treasurer—Audit—Representations.

The treasurer of a county for a number of years embezzled county funds, and by manipulation of his books deceived the county auditors who, from year to year, reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While, in fact, in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became, at his request, one of his sureties, and at the time was told in good faith by some of the county officials that the treasurer's accounts were correct:

Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.

Held also, that the statements made by the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence.

Judgment of ARMOUR, C.J., reversed.

Osler, Q.C., and *J. A. McCarthy*, for appellants. *Aylesworth*, Q.C., and *W. A. Boys*, for respondent.

From Rose, J.] KERR *v.* LITTLE. [Oct. 4.

Easement—Right of way—Prescription—Landlord and tenant—Acknowledgment by tenant.

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the owner of the servient tenement two pairs of shoes as consideration for the exercise of the right:

Held, that even if an act of this kind could in any event affect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority.

Judgment of ROSE, J., affirmed.

DuVernet and *Millican*, for appellant. *Aylesworth*, Q.C., for respondents.

From Armour, C.J.] [Oct. 4.

GREAT NORTHERN TRANSIT COMPANY *v.* ALLIANCE INSURANCE CO.

Insurance—Marine insurance—Construction of policy—Condition.

The defendants insured a vessel for a stated period, "whilst running on the inland lakes, rivers and canals during the season of navigation, to be laid up in a place of safety during winter months from any extra hazardous building." At the time of the issue of the policy the vessel was at a dock in inland

waters, and remained there unused, though at all times in condition to be used, for more than two years, when she was destroyed by fire, the policy having been kept in force.

Held, per BURTON, C. J. O., and OSLER, J.A., that the risk did not attach, the meaning of the policy being that the vessel was insured during the season of navigation only while in commission.

Held, per MACLENNAN and MOSS, JJ. A., that the phrase in question was used merely to limit the risk geographically, and that the risk did attach.

In the result the judgment of ARMOUR, C.J., in favour of the plaintiffs, was affirmed.

W. Nesbitt and *R. McKay*, for appellants. *McCarthy*, Q.C., *W. M. Douglas*, and *MacInnes*, for respondents.

From Armour, C.J.] [Nov. 15.

TOWNSHIP OF LOGAN *v.* TOWNSHIP OF MCKILLOP.

Ditches and watercourses Act—57 Vict. c. 55 (O.)—Owner—Appeal from award—Service of notices—Deepening ditch.

Per OSLER and MOSS, JJ.A., BURTON, C.J.O., contra. Where in proceedings under the Ditches and watercourses Act, 57 Vict. c. 55 (O.), a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner must be brought before, and decided by, the County Judge; the effect of section 24 being that the award when made cannot be impeached on such a ground. *York* v. *Township of Osgoode*, 24 O.R 12; 21 A.R. 168; 24 S.C.R. 282, distinguished.

Per MACLENNAN, J.A., BURTON, C.J.O., and MOSS, J.A., contra. A person in possession of land under a lease with an option to purchase, no default having occurred, is the owner of the land within the meaning of the Ditches and watercourses Act, 57 Vict. c. 55 (O.), and as such entitled to join in initiating proceedings thereunder.

Per OSLER, MACLENNAN and MOSS, JJ.A. Where land affected by a proposed work is vested in several persons as devises in trust, none of them living upon the land, service of notice of proceedings under the Ditches and watercourses Act upon one of them for all is sufficient; at any rate sections 23 and 24 cure any objection of this kind.

Per OSLER, MACLENNAN and MOSS, JJ.A. Sec. 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended, and for work of that kind the two years' limitation is not in force.

In the result the judgment of ARMOUR, C.J., was reversed, BURTON, C.J.O., dissenting.

Garrow, Q.C., for appellants. *Shepley*, Q.C., for respondents.

From Divisional Court.] MILLER *v.* LEA. [Nov. 15.

Action—Assault—Criminal prosecution—Civil remedy.

The civil right of action to recover damages for assault is not taken away by the criminal prosecution and ismissal or punishment of the offender, unless

the complaint has been preferred by or on behalf of the person aggrieved. Where a summons is issued by a peace officer of his own motion, and the person aggrieved attends the hearing and gives evidence, the right of action remains.

Judgment of a Divisional Court reversed.

W. Nesbitt, and *W. J. Clark*, for appellant. *Delamere*, Q.C., and *F. C. Snider*, for respondent.

From Armour C.J.] HESKETH *v.* CITY OF TORONTO. [Nov. 15.

Municipal corporations—Fire brigade—Negligence—Damages.

A municipal corporation is liable in damages when the death of a person is caused by the negligence, while in the performance of their duty, of members of a fire brigade organized and maintained by it. Judgment of ARMOUR, C.J., affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *Geo. Wilkie*, for respondent.

From MacMahon, J.] HENDERSON *v.* CANADA ATLANTIC R. W. CO. [Nov. 15.

Railways—Highway crossing—Statutory warning—Damages—Mental shock.

The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit not only of persons crossing the line of railway, but also of persons lawfully using the highway, and approaching the line of railway.

Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway, and his horses were frightened by a passing engine, and injury resulted, he was held entitled to recover.

Damages for "mental shock" are not recoverable.

Victoria Railway Commissioners v. *Coultas* (1888), 13 App. Cas. 229 followed.

Judgment of MACMAHON, J., affirmed.

Osler, Q.C., and *Chrysler*, Q.C., for appellants. *W. Nesbitt*, and *Glyn Osler*, for respondent.

From Drainage Ref.] MCCULLOCH *v.* TOWNSHIP OF CALEDONIA. [Nov. 15.

Drainage—Invalid by-law—Damages—Charging assessed area.

Upon the receipt of a petition from certain property owners the municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, and directed an engineer to make the usual report. The engineer made his report and assessed the cost of the work against lands in three townships, but on the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council, then, without any new petition or engineer's report, and without notice to the other townships, passed a by-law for the construction of the works, adopting with some changes the report already made:

Held, that this by-law was void. Where a by-law for the construction of drainage works is void, damages awarded to a landowner because of injury to his crops caused by the negligent construction of the work are not to be assessed against the drainage area assessed for the work, but are chargeable against the initiating municipality. Judgment of the Drainage Referee reversed in part.

McEvoy and *McCrimmon*, for the appellant. *Robinson*, Q.C., and *Hall*, for respondent.

From Robertson, J.] CURRAN *v.* GRAND TRUNK R. W. Co. [Nov. 15.

Railways—Omission of statutory duty—Dominion Railway Act, 51 Vict. c. 29, s. 289—Constitutional law—Workmen's compensation for injuries Act—Executors and administrators—Damages—Reduction of damages—New trial.

The above section giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained," is intra vires, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section.

The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under Lord Campbell's Act, without waiting six months.

Judgment of ROBERTSON, J., affirmed.

The Court thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accept a reduced amount.

H. S. Osler, for appellants.

From Divisional Court.] MILES *v.* ANKATELL. [Nov. 15.

Fixtures—Mortgagor and mortgagee—Wooden building.

A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband, who swore that it was placed on the land without any intention of leaving it there permanently.

Judgment of a Divisional Court (ante. p. 36), 29 O.R. 21, reversed.

J. Bicknell, for appellant. *W. J. Clark* and *G. H. Galbraith*, for respondent.

From Boyd, C.] BAKER *v.* STUART. [Nov. 15.

Devolution of estates Act—Dower—Election—R.S.O. c. 127, s. 4.

Where in the administration by the court of the estate of an intestate, lands have been sold, and the purchase money paid into court and not dis-

tributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of estates Act.

Judgment of BOYD, C., 33 C. L. J. 431, 29 O.R. 388 affirmed.

J. H. Moss, for appellants. *Armour*, Q.C., for the respondent.

From Street, J.] [Nov. 15.

CITY OF KINGSTON *v.* KINGSTON ELECTRIC R. W. CO.

Street railways—Contract—Running cars—Specific performance—Injunction—Mandamus.

The court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the court cannot oversee the carrying out of the judgment if granted. Nor will the court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out in toto, as this would also involve the same minute supervision. Nor will the court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind, the performance of which in specie is not deemed enforceable by the court.

Semble. A prerogative writ of mandamus cannot be granted in an action, only on motion, but even if it can be granted in an action it will not be granted to enforce such an agreement which, though ratified by an Act of the legislature, remains a private contract.

Judgment of STREET, J., 33 C.L.J. 395; 28 O.R. 399, affirmed, MACLENNAN, J.A., dissenting.

Robinson, Q.C., and *D. M. McIntyre*, for appellants. *Aylesworth*, Q.C., and *W. F. Nickle*, for respondents.

HIGH COURT OF JUSTICE.

Ferguson, J.] [Sept. 26.

TOWNSHIP OF STAMFORD *v.* VILLAGE OF NIAGARA FALLS.

Municipal Act—Original road allowance between village and township—Joint liability to keep in repair—R.S.O. (1897), c. 223, s. 622—Damages.

The centre line of an original road allowance constituted the dividing line between a village and a township. Each municipality at first kept in repair the half within its limits. Resolutions were then passed by each municipality whereby it was agreed that the whole road should be kept in repair by the village, which it did, the township undertaking and keeping in repair other roads similarly situated; but no by-laws were passed for the purpose. In order to repair and widen the road, the village entered upon and took sand from the half of the road within the township limits.

Held, that the village was acting within its powers, for it had the right to enter and repair the road regardless of the half thereof upon which the

repairs were done, sec. 622 of the Municipal Act, R.S.O. (1897), c. 223, creating a joint jurisdiction and liability therefor. A claim for damages by reason of the taking of the sand and alleged damage to a high school building was disallowed.

W. M. Douglas and *J. W. Hall*, for plaintiff. *Griffiths*, for defendants.

MacMahon, J.] BABE *v.* BOARD OF TRADE. [Oct. 12.

Board of Trade gratuity certificate—Designation of persons to be benefited.

A gratuity certificate issued by the Board of Trade to a member thereof, was made subject to the by-laws of the board, whereby the amount payable thereby was payable to certain persons or class of persons, and in such proportion as might be designated by the member in writing and under his signature, a blank being left in the certificate for such designation, and unless he so designated, the amount was made payable, where there was a wife and children, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member. By his will he directed that after the payment of his debts and funeral expenses, all his estate should be converted into cash, etc., and the widow should have the same for her life, and after her death it should be equally divided amongst his children.

Held, that the fund formed no part of the deceased estate, and therefore did not pass under his will, but went to the widow and children to be divided between them as provided for by the by-laws governing the fund.

McGregor and *East*, for plaintiff. *W. R. Riddell*, for the Board of Trade. *Godfrey*, for adult children. *A. J. Boyd*, for infant children.

Rose, J., MacMahon, J.] CAMPBELL *v.* DOHERTY. [Oct. 12.

Venue—Change of—Cause of action—Convenience—Expense—Right of plaintiff.

The injury on account of which the plaintiff sued was received by him in the defendant's building in the county of Huron, but the plaintiff afterwards went to live in the county of Wentworth, and named Hamilton as the place of trial.

Held, that the defendant's application to change the venue to Goderich could not be granted, the difference in expense not being more than $40, and the number of witnesses in Huron county not exceeding the number in Wentworth by more than four.

Leave to appeal was refused by the Court of Appeal on the 16th November, 1898, the opinion being expressed that it was well settled practice that the plaintiff had the right to name the place of trial, and his choice would not be interfered with except on substantial grounds.

J. Dickson, for plaintiff. *J. H. Moss*, for defendants.

Street, J.] SELI *v.* SMITH. [Oct. 15.

Action to set aside mortgage—Registration of lis pendens—Injunction to restrain parting with mortgage—Necessity for—Costs.

The commencement of an action to set aside a mortgage as having been given without consideration and to defraud creditors, and the registration of a lis pendens is notice of the plaintiff's claim, so as to affect persons subse-

quently dealing with the mortgage; and an injunction to restrain the mortgagees from parting with the mortgage, or assigning their interest therein, is unnecessary. An interim injunction obtained in such a case was dissolved with costs.

Masten, for plaintiff. *Elliot*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [Oct. 31.

INCORPORATED SYNOD OF TORONTO *v.* FISKEN.

Landlord and tenant—Action for rent and possession—Parties—Judgment for possession against tenant binds sub-tenant.

In an action by a landlord for overdue rent and possession of the premises under a clause for re-entry contained in the lease, it is not necessary to make sub-tenants parties defendant, and a judgment may be given against the tenant for possession under which the sub-tenant must go out. Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., for plaintiffs.

MacMahon, J.] SHERWOOD *v.* BALCH. [Nov. 10.

Arbitration and award—Motion to stay proceedings—R.S.O. c. 62.

Motion for an order staying proceedings in an action under section 6 of Arbitration Act, R.S.O., c. 62. The action was to recover a balance claimed to be due under a contract for construction of a railway. The contract contained a clause that in case of any disputes or differences as to the meaning of the agreement, price to be paid, etc., such dispute should be referred to the engineer, whose decision should be final, and to whose arbitration the parties to the contract agreed to submit any such dispute. It appeared that a question in dispute had arisen as to whether, in the event of earthwork being measured in embankment instead of excavation, an increase of a certain percentage according to the soil, over and above the embankment figures, should be allowed. The plaintiffs contended that there was a well known custom or usage of this country to this effect established in connection with railroad contracts, while the defendants refused to recognize any such usage. There was evidence that the engineer had publicly and privately expressed himself that no such usage existed. This the engineer did not deny, but stated that he was not satisfied that there was any such usage, but that he did not mean that he would not give the plaintiff's contention fair and impartial consideration should the matter come before him as arbitrator.

Held, that on this state of facts, the proceedings in the action should be stayed. *Jackson* v. *Barry Railway Company* (1892) 1 Ch. 138 238, specially referred to.

Saunders, for motion. *Code*, contra.

Boyd, C., Ferguson, J., Meredith, J.] IN RE EASTMAN. [Nov. 17.

Appeal to Divisional Court from Surrogate Court—Notice—Affidavit—Security.

A motion by the executors of the will of Chester M. Eastman to quash an appeal by certain of the beneficiaries under the will, from an order made on

13th July, 1898, by the Judge of the Surrogate Court of the county of Lambton, fixing at $600 the compensation of the executors for their care, pains, and trouble in and about the estate.

J. H. Moss, for the motion, contended that, as no notice of appeal was served until September, no affidavit filed by the appellants showing the amount involved in the appeal, and no security given for costs, as required by the Surrogate Court rules, the appeal was not properly lodged.

S. Alfred Jones, for the appellants, contended that long vacation was not to be reckoned in the time for appealing, and that the affidavit and security were unnecessary under the present practice.

The Court made an order quashing the appeal, but without costs, owing to the confusion and uncertainty of the practice.

Per BOYD, C.: The notice was insufficient.

Per FFRGUSON and MEREDITH, JJ.: The security seems to be necessary. The Surrogate Courts Act and Rules govern the matter.

Rose, J.] REGINA *v.* TORONTO R. W. CO. [Nov. 17.

Municipal corporation—Offences against by-laws—Summons against company—Service—R.S.O. c. 223 s. 705—Criminal Code, 1892, ss. 562, 853, 858.

Motion for prohibition.

Held, that the provisions of section 705, of the Municipal Act, R.S.O. 1887, c. 223, as to summary prosecutions before a Justice of the Peace for offences against by-laws apply to companies as well as to individuals; as do also ss. 562, 853 and 858 of the Criminal Code, as to service of summons, and what is to follow after such service, although some of the provisions of the latter are applicable to persons only, and others to persons and corporations.

Bicknell, for motion. *Fullerton*, Q.C., contra.

Armour, C.J.] [Nov. 17.

IN RE MCLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Municipal corporations—Arbitration—Appeal—Time—Filing—Notice.

An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation, is an award which does not require adoption by the council, but is subject to an appeal to the High Court, as provided by R.S.O. c. 223, s. 405; and the practice as to the appeal is governed by R.S.O. c. 62, ss. 31, 34, 47.

Where it is not shown that such an award has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail.

Blain for the landowner. *McKechnie* for the municipality.

Armour, C.J., Street, J.] WALKER *v.* GURNEY-TILDEN CO. [Nov. 25.

Solicitor—Lien—Settlement of action—Notice—Collusion—Fruits of litigation—Ascertainment of amount due solicitor—Collateral proceeding.

After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the

plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff.

Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien.

Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitor's costs, but had to be determined in another proceeding before the determination of such motion.

Shepley, Q.C., and *J. H. Denton*, for defendants. *Washington*, for plaintiff's solicitors.

ASSESSMENT CASES.

IN RE THE APPEAL OF THE C.P.R. TELEGRAPH CO.

Assessment—Switchboard and telegraph instruments—Constructive annexation to freehold—Fixtures.

Held, that the switchboard and telegraph instruments, with their attachments, connected with the appellants' poles and wires, and being in use in the business of a telegraph company, are assessable as realty.

[TORONTO, November 17—MCDOUGALL, Co.J.

This was an appeal from the assessment of the switchboard and telegraph instruments and attachments of the C.P.R. Telegraph Co. at their head office in the City of Toronto.

It appeared that the wires of the company were conducted from their poles into the building used by them as their office. These different wires were connected with a switchboard, that is, the different wires from different parts of the outlying country were all conducted to a common centre and connected to an article known as a switchboard, by being attached to certain small metal posts or other device on this switchboard. The board itself was fastened in a wooden frame, which frame was screwed or fastened to the walls or floor of the office. The telegraph instruments, which were claimed as forming part of the realty of the appellants (i.e., the poles and wires), were located on tables, and were only used when connected with these poles or wires by another flexible wire, or pair of wires, the connection being made at the switchboard. One instrument could be connected with any line desired by moving and inserting in the proper receptable, or the attaching point of the switchboard, the flexible wires attached to the instrument itself.

The city assessed the switchboard, instruments and attachments as realty, and the Court of Revision having confirmed the assessment, the company appealed to the County Judge.

MacMurchy, for appellants. *Fullerton*, Q.C., and *H. L. Drayton*, for city.

MCDOUGALL, Co. J.: There is much difficulty in defining with accuracy what is real, and what is personal property under the complex civilization of to-day. Many articles which would appear to come within the expression chattels or personal property are by their use or constructive annexation to real property changed in their character, and become and are treated, so far as all legal incidents are concerned, as real property.

The most familiar illustration of this effect of constructive annexation is seen in chattels attached or used with a building or house. Shutters, windows and doors hung upon hinges, keys of the locks, these are all deemed realty once they have been attached to freehold, and their temporary severance, after having been so used, does not restore to them their character as chattels. It is not the being fastened or fixed to the freehold that is the leading principle in many such cases, but it is rather that they become part of the real estate, and pass with it because it is not the mere fastening or fixing that is required, but the use, nature or intention.

So in an American case a chain used as a driving power in a mill, removable at pleasure, was held to be realty: *Farrar* v. *Stackpole*, 6 Maine, 154, and in our own courts tools ordinarily in use for the working of engines and machines (which had been held by the court to be fixtures) were also held to be fixtures passing with the title to the freehold, ROBINSON, C.J., remarking, "These must partake of the character of fixtures to the working of, or with which they were necessary": *Gooderham* v. *Denholm*, 18 U.C.R. 213.

For a clear definition of what constitutes constructive annexation I cannot do better than cite Ewell on Fixtures, page 34. "In order to constitute a constructive annexation to realty, the article in question, though not physically connected therewith, must not only be appropriated or adapted, and necessary to the fit and beneficial use of the principal thing, the realty, and not to a matter of a mere personal nature, but must also be such as goes to complete the building, machinery, etc., constituting the principal thing which is affixed to the land, and must be such as, if removed, would leave the principal thing incomplete and unfit for use, and would not itself alone be equally useful and adapted for general use elsewhere. In respect to all cases of constructive annexation, there exists both adaptation to the enjoyment of the land and localization in use, as obvious elements of distinction from mere chattels personal."

In the case before us, the poles and wires—the real property of the appellants—are silent and valueless as a telegraph line until the electric current conveying the message is transmitted to and interpreted by these telegraph instruments. The instruments themselves have no use or particular value detached from the connection with the telegraph wires, for they, too, become silent and of no commercial value, but, when united with the wires, they form, with the poles and wires, one indivisible whole, a practicable working telegraph line. The wires and poles by themselves are like the boiler of the steam engine

without the engine—the telegraph instrument like the engine without the boiler. United only do they perform any practical purpose. This being the admitted physical and mechanical relation they bear to each other, I think, that in the office of a telegraph company a sufficient number of instruments to effectively receive and dispatch the messages received and sent, form part of the realty of the company in the sense that such instruments are a necessary and essential part of the poles and wires themselves, neither being capable of use without the other. The same remarks apply to the switchboard. This is valueless by itself and is only useful when connected with the various lines of wire. Its construction enables a number of lines to be brought together and centred in a small space, and thus these lines from all points of the compass are rendered available for speedy and effective use by the operators employed at the various instruments.

The price and value of the instruments in use in the office of the appellants, which are the subject matter of this appeal, have been agreed upon between the parties, so that there is, therefore, no difficulty in adjusting the amount to be inserted in the assessment roll. I hold that both the switchboard and the instrument actually installed for daily use are liable to assessment as realty.

IN RE APPEALS OF TORONTO ELECTRIC LIGHT COMPANY AND CANADIAN PACIFIC R. R. COMPANY.

Assessment—Costs—R.S.O. c. 224, ss. 79, 80, 84 (1), (5), (6).

Held, that on an appeal from a Court of Revision to a Board of three county judges the only costs that can be ordered to be paid to a successful appellant are witness fess on Division Court scale, and the per diem allowance to the two outside judges.

(TORONTO, Nov. 17—MCDOUGALL, DARTNELL, MCGIBBON, Co. JJ.

The above companies were appellants from the decision of the Court of Revision confirming the assessment on certain properties in the City of Toronto. Having succeeded on their appeal before the Board of three county judges, provided for by s. 84 (1) of the Assessment Act, R.S.O., c. 224, the appellants applied for their costs, claiming the witness fees allowed by s. 80, as also the return of all the money deposited under s. 84 (5), for providing the expenses of the two judges from the outside counties.

H. O'Brien, for Toronto Electric Light Company, and *MacMurchy*, for Canadian Pacific R. R. Company. The only mode of enforcing an appeal to the Court of Appeal, from a decision of the Court of Revision, is by proceeding under s. 84 (1) before a Board of three judges. The words "and the sum so paid," in s. 84 (1), include both the travelling expenses payable to the judge, as well as the per diem allowance. The word "sum" refers to the aggregate of the disbursements mentioned in the previous part of the section; and, by the interpretation Act the word "sum" may be read in the plural, and that would be the reasonable reading, in view of the previous part of the section.

Fullerton, Q.C., and *H. L. Drayton*, contra. The words "and the sum so paid" are limited to the per diem allowance, and the travelling expenses are dealt with by the statute and directed to be paid out of the sum deposited by the appellants.

McDOUGALL, Co.J.: The only costs that can be given under the statute are witness fees on the Division Court scale, and the per diem allowance to the two judges from outside counties. The travelling expenses are expressly directed by the section of the statute to be paid by the clerk of the municipality out of the deposit made with him by the complaining ratepayer, the appellants, and the balance of such deposit ordered to be returned to them. The Court has no discretion to order these expenses to be paid otherwise. The order for costs will be made in that way.

DARTNELL, Co.J., and McGIBBON, Co.J., concurred.

Province of Nova Scotia.

SUPREME COURT.

Graham, J.] HART *v.* GIFFIN. [Nov. 1.

Statute of Limitations—Executor—Part payment.

This was an action brought on the 10th day of January, 1898, on a judgment recovered on November 24, 1876. The defence was the Statute of Limitations. An execution was issued Dec. 17th, 1877, returnable within sixty days, and the sheriff sold the defendant's lands under the execution, and credited the proceeds on the execution. The plaintiff contended that this was part payment under the statute.

Held, that there was part payment within the meaning of the statute, following the reasoning in the case of *Chinnery* v. *Evans*, 11 H.L. Cas. 115, where enforced payment was held to be equivalent to voluntary payment for the purposes of the Statute of Limitations.

J. A. Fulton, for plaintiff. *Macgillivray*, Q.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] CUSLING *v.* KELLY. [Nov. 4.

Woodmen's Lien Act—Logs detained in transit—Order for sale.

Logs detained on a stream for want of sufficient water for driving are in transit within the meaning of s. 12 of the Woodmen's Lien Act, 1894, and an order of sale made by a County Court Judge under s. 18 of the Act, while the logs are so detained is invalid.

L. A. Currey, Q.C., for appellant. *A. R. Slipp* and *C. E. Duffy*, for respondent.

Full Bench.] WATEROUS ENGINE WORKS CO. *v.* POIRIER. [Nov. 11.

Trover—Plea of purchase under an equity decree to which plaintiff was not a party.

In an action of trover defendant pleaded that by a decree of the Supreme Court in Equity it was adjudged that he had a lien on the property involved,

and that the said property should be sold for the purpose of satisfying the said lien, and that the defendant, having been granted liberty by the said decree to bid at the said sale, purchased the property as the highest bidder, and thereby became the lawful owner thereof.

Held, on demurrer, that the plea was bad in that it did not allege that the plaintiff was a party to the suit wherein the decree was made.

M. G. Teed, for plaintiff. *Geo. G. Gilbert*, Q.C., for defendant.

Full Bench.] EX PARTE SAGE. [Nov. 11.

Assessment—Certiorari—Bond under Con. Stat., c. 100, s. 110.

The applicant was assessed on the property of a fishing club in Restigouche County, on which he had paid the assessments for several years previously. He was a non-resident and obtained a rule nisi for a certiorari to bring up the last year's assessment, but did not enter into a bond as required by above act.

Held, on motion to make absolute the rule nisi, that a bond was not necessary where the assessment was absolutely void.

McLatchey and *Stockton*, Q.C., in support of rule. *W. A. Mott*, contra.

Full Bench.] EX PARTE SMITH. [Nov. 11.

Absent debtor—Sufficiency of affidavits as to absence—Meaning of "indebted" in Con. Stat., c. 44, s. 3.

A County Judge issued a warrant against the property of S. as an absent debtor under Con. Stat., c. 44, s. 3, on the application of C., who produced his own affidavit, in which the absence of S. from the province was clearly deposed to, and the affidavit of his attorney, in which the latter set forth that he had been informed by S.'s wife that S. had left home, and that she had been communicating with him in the United States by letter. An application was made for a supersedeas under sec. 10, which the judge after hearing refused. The debt, on which the proceedings were founded, although contracted before the debtor left the province, and more than six months before the application for the warrant, had not been due six months prior to the application.

Held, on motion to make absolute an order nisi for certiorari to bring up the warrant, MCLEOD and LANDRY, JJ., dissenting, that the Court, although not deeming the affidavit verifying the debtor's absence satisfactory, would not treat it as insufficient, the County Judge having accepted and acted upon it.

Held also, that it was sufficient that the debt was contracted more than six months prior to the application, though not due for that period.

Order nisi discharged.

W. B. Chandler, in support of order nisi. *A. R. Slipp*, contra.

Barker, J.] KING *v.* KEITH. [Nov. 15.

Mortgage—Interest—Rate.

The proviso for the defeasance of a mortgage was as follows: "The full sum of $225 in four years from the day of the date hereof with lawful interest on the same, at the rate of nine per centum per annum, payable annually on

the 18th day of June in each year, the first payment of interest to be made on the 18th day of June, A.D., 1886 ; the same rate of interest to be paid and chargeable from and after the expiration of the said four years, and until the whole sum is well and truly paid ; overdue interest to bear interest at the said rate of nine per centum per annum."

Held, that the principal money bore nine per cent. interest after as well as before maturity, and that overdue interest bore the same rate whether accruing due before or after the maturity of the principal.

Stockton, Q.C., for plaintiff. *W. B. Chandler*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] FOULDS *v.* FOULDS. [Nov. 10.

Practice—Queen's Bench Act, 1895, s. 31—Registering certificate of decree for alimony—Retrospective legislation.

This was an appeal from the referee dismissing a motion to set aside the registration, since the coming into force of the Queen's Bench Act, 1895, of a decree for alimony obtained in 1889.

Held, that section 31 of the Act authorizes the registration of such a certificate, and applies to decree, orders, or judgments previously obtained. Such cases as *Wright* v. *Hale*, 6 H. & N. 227 ; *Boodle* v. *Davis*, 8 Ex. 351 ; and *Weldon* v. *Winslow*, 13 Q.B.D. 784, show that legislation relating to procedure only, or improving the remedy, is prima facie applicable to prior existing proceedings or rights.

Pratt v. *Bull*, 32 L.J. Ch. 144 ; *Queen* v. *Taylor*, 1. S.C.R. 65 ; and *Hughes* v. *Lundy*, 24 L.J. Q.B. 29, distinguished. Appeal dismissed with costs.

Mathers, for plaintiff. *Mulock*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] MCNERHANIE *v.* ARCHIBALD. [Nov. 10.

Mineral claim—Right of partner who has allowed his license to expire, to share in proceeds of sale of—Mineral Act of 1896, ss. 9, 34, 50, 80-92.

Action for a declaration of partnership in a mineral claim and for an order that plaintiff was entitled to share in the proceeds of the sale thereof by his co-owners.

In 1895, the plaintiff and defendant and one Murchie, went out prospecting together and it was agreed that the three should stake out some mineral claims for themselves, and the plaintiff proposed that they should be interested in

everything that they staked to which the defendant and Murchie agreed. The three then staked a number of claims, some for themselves in their several names. These they sold, and no dispute arose concerning those so staked; but in addition to those claims they located a number of claims for other persons—outsiders—in particular the defendant Archibald (June 21st, 1896), staked a claim known as the Dorothy Morton. He said it was staked on the understanding that he was to have one-half non-assessable interest for staking it, and that the other half was to belong to Chick and Moody, by whom the fees were to be paid. On the other hand, the plaintiff, McNerhanie, claimed that he, under the original agreement, was entitled to a one-third in the half coming to Archibald, and it was in consequence of this dispute that this action was commenced on October 8th, 1897.

The action was tried at Vancouver before IRVING, J. and a common jury, who found that the conversation relied upon by plaintiff as establishing a partnership actually took place, and that the partnership agreement then arrived at applied to the Dorothy Morton. On April 10, 1897, Chick, in whose name the Dorothy Morton was recorded, conveyed to Archibald a one-half interest in the claim, and by a document dated July 19. 1897, Chick, Moody and Archibald entered into an agreement with Messrs. Lang & Ryan for the sale to them of the Dorothy Morton for the sum of $20,000, payable as follows: $1,000 on the deposit in escrow of the crown grant, and a conveyance of the mineral claim; this was paid on January 7, 1898; $8,000 on January 19, 1898; $8,000 on April 19, and the balance on June 19, 1898. This agreement was recorded on July 25, 1897. McNerhanie, who was a free miner at the time the original agreement was formed, and at the time the Dorothy Morton was staked, permitted a certificate to expire in July, 1897, and did not take out a free miner's license until about August 7, 1898.

The defendant in his defence denied any partnership agreement, and set up as a defence that the plaintiff had on July 25, 1897, permitted his certificate to expire, and that under s. 9 of the Mineral Act he forfeited any right which he might have had to claim. The trial judge dismissed the action, holding that by s. 9, on the expiration of the plaintiff's certificate, his interest in the mineral claim vested in the co-owners, and with it his share of the purchase money. On appeal to the full court,

Held, that if a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale, merely because his free miner's certificate was allowed lapse after the making of the agreement.

Martin, Attorney-General for appellant. *Davis*, Q.C., for respondent.

Martin, J.] [Nov. 17.

DROSDOWITZ *v.* MANCHESTER FIRE ASSURANCE COMPANY.

Practice—Judgment debtor—Examination of, where judgment for costs only—R.S.B.C. c. 10, s. 19 and Rule 486.

This was a summons by defendants for an order for the examination of the plaintiff as a judgment debtor for costs only under the above Act or alternatively under Rule 486.

Held, that though the examination could not be held under said sec. 19, as decided in *Griffiths* v. *Canonica*, 5 B.C. 49, yet that under the rule a person against whom a judgment has been recovered for costs only can be examined as a judgment debtor.

Morphy, for application. *Anderson* (McPhillips, Wootton & Barnard), contra.

McColl, C.J.] MCLELLAN *v.* HARRIS. [Nov. 18.

Practice—Affidavit—Sworn before solicitor's agent resident outside Province—Rule 417.

Summons by defendants to set aside an order for service of a writ out of the jurisdiction. It appeared that several affidavits sought to be used in support of the summons were sworn before a notary public of Manitoba, who was the agent or correspondent of the solicitor for the defendants, but was not a solicitor of this Court.

Held, that an affidavit sworn before a notary public in Manitoba who had been acting as agent for the defendant's solicitor, is insufficient under Rule 417, which applies to agents or correspondents without as well as within the Province.

Gilmour, for summons. *Hagel*, Q.C., contra.

Book Reviews.

The Hudson's Bay Company's Land Tenures, by ARCHER MARTIN, barrister-at-law, 1898: London, William Clowes & Sons, limited.

Mr. Martin, now one of the judges of the Supreme Court of British Columbia, has produced a work which will be of lasting historic as well as legal interest as regards the Province of Manitoba and the district of Assiniboia. Its first chapter is upon the subject matter of a paper read by the author before the Historical and Scientific Society of Manitoba in 1892, and which was reprinted in the Western Law Times. The remaining five chapters and the appendices are the result of investigations pursued by the author in regard to the foundations of titles derived from Lord Selkirk and the Hudson's Bay Company in the "Red River Settlement," which has since developed into the important Province and district before mentioned. The company's grant to Lord Selkirk in 1811 comprised 116,000 square miles of territory, and in 1836 the district was repurchased from him by the company, and grants and leases were thereafter made by it until the acquisition of same by the Canadian Government in 1869, which, however, was expressly subject to the confirmation of all titles theretofore granted by the company, thus indicating the importance, in some instances, of investigating titles prior to the crown grant. The work gives evidence of the most careful research, and the subject is handled by the learned author in a way both erudite and entertaining. Lists of grantees under the Earl of Selkirk and the Hudson's Bay Company appear in the appendices as well as a complete copy of the latter company's charter.

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